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In Search of the Working Poor

Charles Murray

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Poverty & Welfare—Another Look

George Gilder

Michael Novak • *Leslie Lenkowsky* • *Allan C. Carlson*
Michael Wiseman • *Douglas J. Besharov*

Men's Clubs, Women's Rights *Roger Starr*

Prison Discipline and Prison Reform *John J. DiIulio, Jr.*

Why "Defunding the Left" Failed *Michael S. Greve*

Public Policy by Prosecution
Arthur Maass

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In search of the working poor

CHARLES MURRAY

THE AMERICAN DEBATE about poverty and public policy has always been grounded in the prevailing answer to the question, "Can any American who is willing to work hard make a decent living?" From the founding of the nation until the 1960s, the consensus answer among policymakers had always been "yes" with minor qualifications. During the 1960s, the policy consensus shifted to "no" and has remained there ever since. Poverty is largely structural, the new received wisdom has held; it is caused by barriers and culs-de-sac in the economy that will inevitably trap certain populations in poverty.

In recent years, the received wisdom has been given a twist, stated most clearly and with the best data in *Years of Poverty, Years of Plenty* by researchers at the University of Michigan using the Panel Study of Income Dynamics (PSID)—a longitudinal data base that began with a sample of some 5,000 American families in 1968 and has been continued through annual interviews since then.[1] The authors of *Years of Poverty, Years of Plenty* work to their conclu-

[1] Greg J. Duncan with Richard D. Coe, Mary E. Corcoran, Martha S. Hill, Saul D. Hoffman, and James N. Morgan, *Years of Poverty, Years of Plenty: The Changing Fortunes of American Workers and Families* (Ann Arbor, Michigan: Institute for Social Research, 1984).

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sions from two new empirical findings made possible by a longitudinal data base. First, if we track the total income of American families over a long period of time, we find that a large proportion of the families experience a year or more in which that income falls beneath the poverty line. Second, we find that only rarely does the income of a poor family remain beneath the poverty line *every* year. To illustrate, if 0 represents a year of income below the poverty line and 1 represents a year of income above the poverty line, only a few poverty profiles of a decade will read 0000000000. Much more often, the profile of a low-income family over a decade will look something like 0101011101. Furthermore, the authors could find no way of clearly distinguishing these "temporarily poor" people from the population as a whole. "They were somewhat more likely to be black or to live in families headed by a woman," they report, "but on the whole, the main difference between them and the rest of the population was simply that they had experienced one or two particularly bad years."

The authors portray an America in which income rises and falls rapidly and steeply for unavoidable reasons. They conclude that poverty is not the lot of a permanent underclass, but for the most part a short-term situation into which many people fall and out of which they rise again. The authors close by quoting approvingly from an earlier study of the PSID:

> [W]e may have been oversold on the Protestant Ethic and have refused to see the extent to which people are the victims of their past, their environment, luck, and chance. It is after all difficult to believe that there are not some situations where individual effort matters—in seizing opportunities for better jobs, moving to new areas, or avoiding undue risks. But for public policy purposes and for arguments about the extent to which one could reduce dependency in our society by changing the behavior and attitudes of dependent members, the findings certainly do not encourage expectations that such changes would make much difference.

One key conclusion of the structural argument—that poor individuals are not responsible for their poverty—remains intact, but a new charge is added: The American economy leaves large sections of those not poor vulnerable to sudden attacks of poverty. The logical policy implication drawn from this conclusion has been that generous income supports make an appropriate buffer against a turbulent and chancy economic system; it is not good enough that people simply go out and try their best to make a living.

As I read this analysis, I suddenly realized that my own experience was fodder for the authors' quantitative case. In the late 1960s I had been making a living and supporting a family, then went to

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graduate school, then resumed making a living. My poverty profile from 1969 to 1978, the years used for the poverty analysis in *Years of Poverty, Years of Plenty*, was 1100111111. Or if one started my overall income profile at 1971 and ended it at 1978, the years that the authors use for their analysis of income mobility, I was one of the Horatio Algers who struggled all the way from poverty to the top quintile of the American income distribution. My history exemplified the numbers reported in *Years of Poverty, Years of Plenty*. But the interpretation drawn from those numbers was completely inapplicable to me. I had never been thrown out of work—I left the labor force voluntarily. My economic improvement following poverty reflected nothing more than a predictable income trajectory for young men with a new professional degree. Perhaps most importantly, I had never really been poor. It only looked that way. Mightn't such realities explain much of the chaos reported in *Years of Poverty, Years of Plenty*?

I recently had the opportunity to examine the PSID from this perspective, as reported in more technical detail elsewhere.[2] Here I summarize one of the main results of that inquiry, half hopeful and half disturbing. The hopeful half is that poverty in America is seldom the result of uncontrollable events involving the economic system. I will argue that the old wisdom—that anyone who is willing to work hard can make a decent living—has much more truth to it than has recently been acknowledged. The disturbing half is that our current popular understanding of the poverty population may be very wide of the reality. I conclude with a proposal for clarifying the situation.

Focusing on adults on their own who try to work

The discussion focuses on the American labor market as a way of escaping poverty. I assume that people 65 and over are not expected in the normal course of events to be in the labor market. (I discuss the physically disabled below.) Otherwise, I assume that any person of working age does in fact have the choice of the labor market open to him or her. So while in one sense this discussion ignores a dominant source of poverty (the female-headed household where the woman is not in the labor market), in another sense the findings are

[2] Charles Murray and Deborah Laren, *According to Age: Longitudinal Profiles of AFDC Recipients and the Poor by Age Group* (Washington, D.C.: American Enterprise Institute, September 1986), from which material in this article has been adapted. I am grateful to Greg Duncan, co-director of the PSID and lead author of *Years of Poverty, Years of Plenty*, for his encouragement and many substantive contributions throughout the effort.

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at least pertinent to that population. The labor market is not an attractive short-term option to many such women (in some cases for very sound reasons), but the evidence about the labor market suggests that it is probably an excellent long-term one.

The data base I originally drew from the PSID consists of all persons in the PSID who in 1970 were either the head of household (excluding full-time students) or the spouse of a head of household and were between the ages of 20 and 64 inclusive—in other words, "adults on their own." The follow-up period is the subsequent ten-year period 1971-1980. In the following discussion, I will sometimes omit the adjective "working-aged" for purposes of convenience, but it always applies.

To represent each subject's poverty profile over the years 1970-80 in an easily scanned summary, the income for each of those eleven years was converted to a number ranging from "0," representing an income below the poverty line, to "9," representing an income of more than three times the poverty line. Each number from 1 to 9 represents an increment of 25 percent of the poverty line (e.g., "3" represents an income ranging from 151-175 percent of the poverty line). In effect, people with an income denoted by "9" are in the middle class (three times the poverty line for an average family of four in 1986 represented an income of more than $33,600).

Using this framework, I examined specific subpopulations of interest, in each case looking for patterns in case-by-case reconstructions. Three important notes about the presentation are that (1) all income figures are given in 1987 purchasing power, (2) all percentages refer to national proportions, using the PSID weighting system, and (3) the sketches used as illustrations are based on actual cases in public-use data tapes but have been converted to unrecognizable composites in compliance with the PSID's promises of confidentiality to its respondents.

The question: Given that a person is poor but in a household that is participating in the labor market, what happens over the next ten years?

The curious case of education

The obvious first way of disaggregating the dynamics was to examine poverty among populations with varying educational levels, and the attempt to do so brought forth the first notable finding. As of 1970, there was such a small problem of poverty among people with a basic education that it is difficult to analyze how it occurs and how it is escaped. Even with 4,702 cases in the data

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base, there is a scarcity of data. For example, one interesting source of patterns was thought to be college graduates. What happens to them after a spell of poverty? The answer is that poverty strikes so seldom that, among the 604 cases of working-aged adults in the PSID who were poor in 1970, only six, representing a national proportion of nine-tenths of one percent of the working-aged college graduates, were poor in 1970. None sank below the poverty line in 1980. One of the six, a person not in the labor market, experienced significant poverty in the intervening years. Only one other case exhibited even a single year of subsequent temporary poverty.

More surprisingly, the same obstacle—too few cases—impeded an analysis of poverty among that archetypical American family wage earner, the white high-school-educated male. The 604 cases of poor people in 1970 again included just six such cases, representing three-tenths of one percent of all such white males between the ages of 20 and 64. The situation is only slightly different for white women who had a high school degree or were married to someone with a high school degree. Only eighteen cases, representing 1.3 percent of that population, were poor in 1970. Of these women, only ten had worked at all in that year, and only two had worked more than fifteen weeks.

The small proportions of college and high school graduates who are involved in the analysis convey how easy it is to lose track of the poverty problem in our preoccupation with the people who *are* poor. Poverty does not strike throughout the American population like the flu; it is tightly concentrated. Even within populations we have become accustomed to thinking of as having serious economic problems with job insecurity (blue-collar workers with just a high school education, for example), the incidence of actual *poverty* (as distinguished from other kinds of economic problems) was extremely low, even during an economically lackluster decade.

This general observation applies most dramatically to the black population. In 1970, the Bureau of the Census showed that 30 percent of the black population was living below the poverty line. The PSID for that year showed 22 percent of working-aged black adults below the poverty line. These are extremely large proportions, as befits the central role that black poverty has played in the poverty debate. Contrast those figures with this one: Of working-aged black men in the PSID who had just a high school education, only 5 percent were poor. Even among black women, only 10 percent of those with a high school education were below the poverty line. I hasten to add that the black male figure should be interpreted as "married

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black males with a high school education," for the PSID carries only a few single black males in that category. Nonetheless, such findings (which have been reached by others with census data on the incomes of black married couples and black full-time workers) bear emphasizing. For many years now, the severe black poverty problem has had little to do with blacks with a basic education, married blacks, or blacks who remained continuously in the labor market. If in 1970 the black poverty rate had equalled that experienced by blacks who had finished high school, it would have been more than a percentage point lower than the overall poverty rate among American whites.

The more general statement is that poverty among the working-aged in 1970 was a phenomenon among people with less than a high school education, who constituted a remarkable 75 percent of working-aged adults below the poverty line.[3] That most poor people are ill-educated does not mean that most ill-educated people are poor. On the contrary, 90 percent of them were not poor in 1970, 90 percent were not poor in 1980, and 84 percent were not poor in either year. But three out of four people who were poor came from that group.

The curious case of disability

Another obvious dimension for analyzing poverty among the working-aged is physical disability. Disability itself is closely associated with poverty: 36 percent of the poor in 1970 reported that the head of household suffered a disability that affected both the kind and amount of work he or she could do. Among those poor who were not disabled, to what extent is subsequent poverty a function of subsequent health misfortunes? The answer is that, among those who had no disability in 1970 and had been in the labor market, 13 percent were reporting a major disability by 1980. This argues for the importance of disability in formulating policy toward the poor, and must be remembered as a qualifier when assessing the

[3] In subsequent years, Current Population Survey (CPS) data show that the proportion of people getting high school degrees has risen sharply, making possible indirect analyses of what caused the relationship between a high school degree and low poverty in 1970. (Was it self-selection? Education? Credentialing?) The short answer (again using CPS data) is that the proportion of persons with less than a high school education who are not in poverty (about 80 percent by the CPS's method of counting) remained fairly constant from 1975-1985, declining very slightly overall, while the percentage of the poor who come from the group fell rapidly. The implication is that it is about as easy as ever for the ill-educated to make a living above the poverty line, but that the persons now drawn into the high school degree pool are not acquiring the same level of protection against poverty that a high school degree used to represent—a combination of trends with intriguing implications that are too complicated to explore here.

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reliability of the labor market. If you are poor and in the labor market, these data say, there is a one-in-eight chance that you will be impeded from remaining in the labor market over the next decade because of physical handicap.

But once again, an obvious question produced curious results. Almost nine out of ten persons who were both poor and disabled in 1970 (88 percent) also happened to come from that same ill-educated population that dominated the ranks of the poor. A variety of hypotheses explain why this might be so. For example, the ill-educated and poor tend to work at manual labor, and manual labor tends to produce physical ailments. Or they received inferior health care. Or the reason they got less than a high school education was related to mental or emotional deficiencies that also tend to produce (or not to prevent) physical disabilities. Or they said they were disabled to avoid the responsibilities of work or to get disability benefits.

Whatever the combination of explanations might be (and some good empirical work on the subject is needed), the initial concentration of physical disability among the ill-educated is compounded by what happened between 1970 and 1980. Of those among the poor who did *not* have a disability in 1970 but had acquired one by 1980, 81 percent of the newly disabled persons had less than a high school education. The net result is that the person with a high school degree or more who was physically disabled and poor in 1970 was rare (0.3 percent of adults with high school education or better), and the educated, poor, able-bodied person in 1970 who left the labor market because of a physical disability over the course of the decade was even rarer. As I discuss the dynamics of subsequent poverty among those who stayed in the labor market, the bare statement about disability is that of those who were able-bodied and in the labor market in 1970, almost 13 percent were reporting a major disability in 1980. The more complete statement is that this form of misfortune remains a curiously selective affliction of the ill-educated, and that something more complicated than the hand of fate is involved.

Trying to understand subsequent poverty among working people

The preceding discussion establishes that whenever we talk about working-aged people below the poverty line we are talking about an extremely small minority of the American population, and that this small minority is itself systematically concentrated among a particular subgroup. For most purposes, the case for the labor

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market is already made. We may try to imagine, for example, setting up goals for an economic system that was being devised from scratch. Only the most optimistic would set standards of success as demanding as those reflected in the numbers just presented. But there remains the periodic, temporary poverty that *Years of Poverty, Years of Plenty* emphasized, which was the initial subject of my inquiry. The conclusion I take from a reconstruction of cases in the PSID is that an unknown but large portion of people listed as being "below the poverty line" are not living in poverty. What appears to be "temporary poverty" is often no such thing, and the precipitous ups and downs are often statistical rather than a reflection of real changes in quality of life.

The Mississippi fallacy

How can one hypothesize that large numbers of people below the poverty line are not really poor, when (it is widely argued) the current poverty line is far too *low*? Three general factors are at work. Let me preface them by noting a general problem that has deformed our image of the poor.

When staff members from CBS News or the *New York Times Magazine* or a congressional investigating committee want to do a feature on poor people, they do not sample randomly from the population below the poverty line. Since their topic is real poverty, not official poverty, they quite sensibly search out people who fit the description of people who really are "living in poverty," and any Human Services Department in almost any county can readily give them a few vivid examples. Thus when poverty among the aged appears on the television screen, it tends to consist of a single elderly woman isolated in a tiny room in a big city. A poor child is an ill-clad waif playing amidst trash heaps. A poor rural person lives in a tar-paper shack—peculiarly often in Mississippi (hence the label for the fallacy). These people are indeed "typically" poor in the conceptual sense of impoverishment—misery is an essential part of our understanding of what genuine poverty should mean. But we tend to reify poverty on the basis of such images, and then assume that the poverty index identifies the same population—a logical leap that no one familiar with the problems of measuring poverty would make. Real, unquestioned poverty exists in the United States and in the cases of the PSID, and nothing that I am about to say is intended to belittle that reality. But when cases are pulled from the pool of people whose only qualification is that they are below the official poverty line, a much different distribution of portraits emerges.

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The following cases are presented as illustrations. I continue to focus on the working-aged and the question of ability to make a decent living. Remember that all dollar figures are given in terms of 1987 purchasing power.

People in small towns and rural areas

The poverty profile for Mr. and Mrs. A is 00001011330. This husband and wife were in their mid-thirties in 1970. He had a grade school education; she finished junior high. That opening year, he worked full time, she worked 1,200 hours, and still they brought in an income of only $7,000. Mr. and Mrs. A had two years in the late 1970s when they escaped near-poverty, but that was a brief respite. They both worked in 1980, but they were once again poor.

Mr. and Mrs. A seem to be a classic case of the working poor: They plugged away, almost got out of poverty, had a few better years, but slid back into poverty even though they continued to work. Now consider part two of the profile, remembering that they both lived throughout this period in a rural area (meaning a town of fewer than 10,000 people or the countryside itself).

Following that first year in which they made only $7,000, Mr. and Mrs. A are shown by the poverty index as being constantly in poverty or near-poverty for the next seven years. But during those same years they brought home an average income of $16,000 (excluding the more prosperous years of 1978-79). In 1980, when they were again shown as having fallen into poverty, they made $14,000. Mr. B owned three working vehicles, including two trucks that he used as part of his business. Mr. and Mrs. A also owned their own home free and clear, a five-room house that the PSID interviewer gave the highest ratings for neatness and condition.

The case illustrates many of the ways in which reality can diverge from the image of poverty, but the one I want to stress here is that the income brought in by this "poor" family was not being spent in a large city but in rural America. These are very different worlds, and yet the definition of the poverty line is precisely the same for the people in both.[4] It is perhaps the most egregious of the several computational inadequacies of the poverty index. As anyone who has lived in both a small town and a city can testify, the differences in the costs of enjoying "a decent existence" are great.

A few of these differences are measurable in dollars. In Denison, Iowa, for example, a town of 6,700 chosen because it happens to represent the national average for housing rental in small towns, the median monthly rent for a residence in 1980 was $290 (in 1987 dol-

[4] Until 1980, thresholds for farm families were 85 percent of the threshold for nonfarm families. There has never been an adjustment for people living in small towns or in the countryside who are not farmers.

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lars). In Manhattan, the equivalent median was $367. This represents a 27 percent difference in one of the key costs of living. Apart from that, the housing costs in Denison and Manhattan are likely to be different because people in small towns, including low-income people, own their own homes more frequently than people in big cities. Married couples (who in 1970 constituted 71 percent of the small-town and rural poor) own their own homes more frequently than single people (who constituted 56 percent of the large-city poor). A couple that in a small town has earned Mr. and Mrs. A's income for thirty years is likely to be paying no mortgage, while a couple earning the same income in Manhattan will probably still have to worry about rent.

But these adjustments and similar adjustments in food and other basic costs are still measured in dollars, and dollars fail to capture the real difference between Manhattan and Denison in the cost of living a decent life. What the average rent does not tell you is how big the rooms are, whether there is a yard for the children to play in, what the place looks like and smells like and how many rats inhabit it. Perhaps even more importantly, the average rent does not tell you what the street outside the front door is like, what the neighbors are like, what the schools are like, and whether you can safely go for a stroll after nightfall.

Among the entire population of the working-aged who were poor in 1970, 30 percent were living in towns of fewer than 10,000 people and another 15 percent were living in small towns (not parts of metropolitan areas) of 10,000-25,000 people.

Poor people with many children

The case of Mr. and Mrs. A could be repeated here as well: They had four children, which is one reason why their real income could be substantial and yet leave them in near-official poverty. Let us add to that a very different kind of sketch involving children:

> Ms. B has a poverty profile of 01022100101. She lives in an inner-city neighborhood, making between $10,000 and $13,000 a year. She remained in or near poverty because she had five children. Four of these children were already of working age in 1970 (ages 18-23) and the fifth was 15. At least three of the five were living with her at any one time throughout the decade. But none of the children worked regularly; indeed, they almost never worked. In addition, one of the daughters had a child of her own who was added to the household.

The poverty index is pegged to the number of people in the household. This makes sense: Children cost money, hence a flat "poverty income" is unrealistic. But it can also lead to nonsensical

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results. For example, it is possible for a person to have an income of $5,500 and be classified as "not in poverty," then over a period of years increase his income to $22,000—quadruple his real income—and in the poverty statistics be shown as one of those people who has slid from "not in poverty" to "in poverty."

Three points are to be made about poverty and number of children. One again has to do with the insensitivity of the poverty index to the difference between living in different types of communities. In the inner city, the marginal cost of a child is probably as great or greater than the index suggests. Few low-income people in a city have an apartment with extra space in which new children (or aged parents or indigent siblings) can be put without crowding the others. But it happens quite often in rural areas that a family with a low income lives in a house with extra rooms, or one in which a new child means nothing worse than converting a one-child bedroom into a two-child bedroom. Hardly anyone in a city has the option of holding down the family's food costs by starting a garden in the back yard, or buying food directly from the farmer; many people in small towns and rural areas have such options (and exercise them).

The failure of the poverty index to take differential cost of living into account also gives the large family in a small town an increasingly larger "discretionary surplus" as family size increases. Suppose (to use a simplified calculation for purposes of illustration) that the cost of a standard food basket is 25 percent higher in Manhattan than in Denison, that in Manhattan it costs $2,000 to feed a couple and $500 to feed each marginal child, and that a standard "food index" is based on the Manhattan costs. The "food index" thereby gives a two-person family in Denison a $400 bulge (money that the Denison family can spend on something else). But when there are six children, the food index has grown to $5,000—and the bulge has grown to $1,000, money that the family in Manhattan is spending on food but the family in Denison (which eats just as well) is devoting to other needs (which are also less expensive in Denison than they would be in Manhattan), and so on. The more children, the greater the discrepancy between the purchasing power of a poverty-level income in the big city and that in the small town.

The second point involves the child as a "revealed preference," in the language of some economists. If a family was making $13,100 last year, barely above the poverty line, then this year gets a raise to $14,100 and a new baby as well, the odds are good (one would like to think the odds are high) that the couple is celebrating both the

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raise and the baby, even as a researcher is marking them down as having fallen into poverty (because the poverty threshold with the extra child has risen to $14,969). Let us say that the next year they get another $1,000 raise and again are above the poverty line. Their poverty profile for the three years has been 101: they were "temporarily poor." But they chose to be poor—or more accurately, they chose to have a child, and unbeknownst to them became poor. Compare their psychological position to that of another family who had been making $13,100, didn't have a new baby, and got a $1,000 pay cut to $12,100, which remained there for still a third year. The way that the poverty thresholds happen to fall, they did not retreat (statistically) into poverty—their poverty profile for the three years is 111—but they are also very likely (with good reason) to feel as if they are going backwards, failing, and living more poorly in the second two years than they did during the first year.

The third, related point involves the explicability of poverty and the role of the economic and social system. The case of Ms. B is apt. A single adult who makes an income of $10,000 (for example) has it within her capacity to live a life that is not "impoverished." Low-income, yes; impoverished, no. Ms. B will be able to do it in the Denisons of America much more easily than in its Manhattans, but she *can* do it. In that sense, it is incorrect to say that a working person who brings home an income of $10,000 but nonetheless is beneath the poverty line "cannot make a decent living." The question rather is what society considers to be a reasonable family wage. Should any working person acting as the sole provider be able to support a spouse above the poverty line? A spouse and a child? A spouse and two children? Should he be able to do it at the age of 18? Should he have to expect to wait until he has "gotten settled" (a quaint, bygone concept) and is able to support a family? All these are questions that will be answered differently by different people. But (at some number of children that I will not try to specify) we should stop confusing the poverty of people who have continued to have children with the poverty of people who "cannot make a decent living" by working. And when Ms. B's children continue to live in the house year after year without contributing significantly to the family's coffers, the system is not failing. Ms. B is making choices—one may or may not think them wise, but they are recognizably her choices.

Among working-aged people below the poverty line in 1970, 34 percent had four or more children in the house. Of these, more than half had six or more.

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Older people who retire early

Mrs. C's profile is 99999993100. Mrs. C, aged 55 in 1980, was widowed during the 1970s. In the two years after Mr. C's death, her income plunged from the $47,000-$50,000 range to below the poverty level, less than $4,000 per year, where it remained through 1980.

To this point I have been discussing subsequent poverty among those who were poor in 1970. Mrs. C's story, and the third perspective from which temporary poverty must be reassessed, involves those who are poor, able-bodied, and making no visible effort to escape their poverty.

According to the numbers, Mrs. C looks like a case study in how poverty has become feminized. She was married to a man with a middle-class income who died and left her without an income. She went from prosperity to poverty. But it turns out that Mrs. C has a college degree and used to work as an accountant. (Her own labor income in 1970 was $27,000.) She continued to work for one year after her husband died, then stopped. As of 1980 she was living in a small town, listed no disability, received no welfare or social security income, and, despite being only 55 years old, termed herself "retired." She continued to live in the paid-off family home in this small town, and, as far as one can tell from the variables in the PSID, continued to live the same life she had lived when her husband was alive.

Two aspects of life in one's fifties and thereafter make such outcomes not only possible but also fairly common. One is that the requirements for income drop sharply when the children are through school, the house is paid for, the car still works, and one has acquired all the sofas, lawn mowers, neckties, and toaster ovens —the material infrastructure of daily life—that one needs. The second is the accumulation of assets. A widow has a modest stock portfolio, for example; she sells a hundred shares of something when she needs extra cash, the portfolio grows enough to offset her occasional sales, and she keeps this up until she dies. The money from the hundred shares never gets reported as income.

The correction of such errors does not lie in improving the adjustment for cost-of-living for the elderly. I could also draw a composite from the PSID whose age, marital situation, and 1980 income are identical to Mrs. C's, but who is frequently ill, has no medical insurance, no inheritance, must rent an apartment in a large city, and is living in desperate poverty. There is no way to construct an across-the-board cost-of-living adjustment that will discriminate between the comfortable and the destitute.

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Among those who were poor in 1980, not disabled, and had reached the 55-64 age bracket (that is, were still below the normal retirement age), 24 percent listed themselves as retired and 26 percent listed themselves as housewives not in the labor market. Of this group, 78 percent had not been poor in 1970. Thirty-eight percent had been making more than three times the poverty threshold in 1970.

Betting on the labor market

Can any American who is willing to work hard make a decent living? Even if we adopt a loose definition of "working poor," including not just people who worked nearly full-time but those who worked *at all* in 1970, the numbers suggest how difficult it is to remain in the labor market and nonetheless continue to be poor. These are the summary numbers:

Of the population of working-aged adults in 1970, 95 percent were not poor. In almost half of the remaining cases, the head of household either was not in the labor market or had a substantial physical disability. This leaves 2.7 percent of working-aged adults who could be classified as living in "working poor households," if we use an inclusive definition that accepts anyone in a household where the head of household worked at least one hour in the preceding year and was not substantially disabled. Of these:

- 49 percent lived in towns of less than 25,000 or in rural areas.
- 40 percent had at least four children in the house.
- 43 percent had 1970 cash incomes of at least $10,000 in 1987 purchasing power.

What happens to a population of able-bodied working poor persons during their subsequent working years? Of those who had worked, or were the spouse of someone who worked, and were of working age (under 65) throughout the follow-up period, by 1980:

- 23 percent were out of the labor market, split between those who reported permanent disability and those who reported being voluntarily out of the labor force. The rates of poverty were 65 percent of the permanently disabled, 53 percent of the retired and housewives.
- 77 percent were still in the labor market. (Of these, 85 percent were no longer poor, and 15 percent were still poor. 78 percent had not been poor at any time in at least the last four years.)

Among the still-poor 15 percent—those members of the working-aged population who had been able-bodied working poor in both

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1970 and 1980, and were still in the labor market and poor in 1980 (who represent three-tenths of one percent of the total working-aged population):

- 26 percent lived in towns of fewer than 25,000 persons (almost all in towns of fewer than 10,000).
- 49 percent had at least four children in the house.
- 60 percent had 1980 cash incomes of more than $10,000 in 1987 purchasing power.

These last percentages are based on only thirty-six cases out of the original 4,702, so the percentages must be assumed to be unstable.

Making sense of the numbers

Poverty is the elephant of social policy, with social scientists playing the role of the groping blind men. We each describe a different appendage without really contradicting one another. In this case, I have asked a specific question regarding people who are in the labor market and reached the conclusion, using the same data base that was used to portray the America of *Years of Poverty, Years of Plenty*, that it is extremely rare for a person to get into the labor market, stick with it, and remain poor. It is quite common for the rare person who is both working and poor not only to escape poverty but to reach the median income range or higher within a few years and remain there securely. Suppose, however, I had made just one different assumption, that people who are not in the labor market are discouraged workers, out of the labor market only because they know there are no jobs (or only "dead-end" jobs). Presto: The portrait can be made to flip completely, and the nation becomes once more a country with structural poverty woven inextricably throughout the economy.

The sort of analytic ping-pong represented by these contradictory descriptions of the numbers must somehow be diverted into a more productive dialogue. The policy implications of the different interpretations are too important, and too contradictory, to be based on the shadowy quantitative sketches available to us. By the same token, however, qualitative summaries of case-histories leave far too much room for selective interpretation in such politically-charged topics, no matter how pure the good faith of the investigator. What is needed first is not more analyses, but better data.

Let me suggest a proposal, and not an impossibly expensive or time-consuming one. Suppose that someone took a nationally representative sample such as the PSID and identified in that pool all the

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persons who were officially below the poverty line. Suppose that a team of interviewers armed with an interview protocol based on open-ended conversation (many established techniques are available) went out and tape-recorded interviews with an appropriately selected sample of a few hundred poor people, who were asked the kinds of questions that the numbers cannot answer. Let me emphasize that I am not advocating ethnographic research, but rather using low-income people as accurate reporters of qualitative information about themselves. In addition to the conversational interview, the research team would collect the standard close-ended items about income, occupation, and demographics. Then suppose that the verbatim transcripts of these interviews, including all of the interviewer's questions and comments, cleansed only of material that would compromise the subjects' anonymity, were made available for scholarly use in the same way that the PSID is available.

Based on my reading of the PSID, I am predicting that such a data base will force major revisions in the received policy wisdom. We will have to slash the accepted count of poor people, if by "poor people" we mean "people without the material resources to live a decent existence." A more specific prediction is that the estimates of rural and small-town poverty among whites will drop sharply. It will be found that year-to-year income shifts seldom mean much—that the trajectory of "standard of living" is far smoother than the year-to-year income figures suggest. What about the disabled? No one knows what the figures concerning them really mean; this will be an opportunity to find out.

The overarching revision in the received wisdom will be in the image of the poor as victims. Some are victims, without question. But a great many people below the poverty line (I will go out on a limb and predict a majority) will be seen as living lives that they choose to live. The most numerous will be people who reveal that they don't consider themselves to be living impoverished lives, even though their income puts them below the federal poverty line. But the PSID data also indicate that most of those who do consider themselves to be poor have an option open to them for increasing their income—the labor market—that they are not using, or are using only sporadically. In still other cases, idiosyncratic decisions (like Ms. B's choice to let her adult, idle children live with her) will be at work.

No data will be able to resolve the question of personal responsibility versus environment or genes. But as matters stand, the policy debate is founded on images of people who are poor for reasons like

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the following: because they cannot work or cannot find work, because they work at jobs that never allow them to rise above the minimum wage, because they are plunged into poverty by unforeseeable disasters. These images, I am arguing, cannot withstand a rich qualitative data base about the officially poor. In any event, two undoubted goods will come from amassing such a data base. One will be to provide the policy debate with a frame of reference, so that we will come closer to arguing about people rather than abstractions. The other will be to remind social scientists and politicians alike of how little poverty has to do with income.

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WELFARE'S "NEW CONSENSUS"

The Collapse of the American Family

GEORGE GILDER

HOW is it possible for a study group headed by a magisterial defender of the family, Michael Novak, and including such profamily analysts as Allan Carlson and Charles Murray to produce, no doubt unwittingly, a profoundly antifamily report on American welfare policy? How is it possible for such a group of conservatives to espouse a set of recommendations that would vastly expand the U.S. welfare state? How is it possible for this learned panel entirely to ignore profamily policies proven effective in a dozen countries and to advocate policies repeatedly proven futile in the United States? We all know there is an enemy out there. But, speaking as a conservative, I wonder: Why does it so often turn out to be us?

With the Orwellian touch familiar in such literature, the study is entitled *A Community of Self-Reliance: The New Consensus on Family and Welfare.*[1] In essence it joins the unthinking rush to a "workfare" state. Requiring welfare recipients, including mothers of small children, to accept jobs, and mandating the government to provide them as a last resort, the study group seeks to go "beyond entitlement," to crack down on the voluntarily dependent poor. But all this tough talk of "responsibility," "obligation," and "duty" is just so much conservative patina on the hard metal of government jobs and day-care entitlements. The reason Mario Cuomo, Bruce Babbitt, and the American Public Welfare Association endorse a

[1] *A Community of Self-Reliance: The New Consensus on Family and Welfare.* Report of the Working Seminar on the Family and American Welfare Policy. American Enterprise Institute for Public Policy Research. Washington D.C. 143 pp.

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similar program is that it would set the stage for a drastic expansion of the American welfare state.

Work requirements mean job entitlements and lead directly and necessarily to child-care entitlements. As anyone knows who is familiar with existing programs (or with small children), public day-care systems almost always become a hopeless mess. But it is a mess with a message for all mothers: Put your job first, children second. It involves taking money from families with mothers at home and giving it to families, often richer, with mothers at work. Thus, subsidized day-care makes a direct public attack on the choices and finances of all traditional families. By not insisting that any day-care funds also go in full measure to mothers caring for their children at home, "workfare" flunks the minimal test of a profamily policy.

Workfare usurps the two human roles that most inexorably depend on moral commitments and difficult sacrifices by fathers and mothers: raising children and providing for them. By lending government authority to the idea that the mother's prime role is earning money rather than raising children, and by implying that the government is remotely competent in child-care and job creation, a national workfare scheme would subvert the foundations of both capitalism and family life.

A basic problem of workfare is that it focuses its job incentives, training programs, and subsidies on women rather than on men because, in general, it is only the mothers who are on welfare. The fathers use the apartments and take the money of a series of welfare mothers, usually without joining the dole. Thus, the recipients of welfare-related work will mainly be women. But we know, as much as we know anything, that only fathers can support families, reliably discipline teenage boys, and lift a community from poverty. The idea that current welfare mothers can do it while the government raises their children is incredibly naive.

The problem of hard-core poverty lies with violent and disruptive men and boys, not with unemployed women. Women already get most of the new jobs in America, particularly among the poor. *Female domination of work among the poor is the problem, not the solution.* Creating more employment and training for women—more advantages over their potential husbands—will only accelerate family decay.

The suavely offered rationale for all these destructive proposals is that most American mothers of small children already work, at least part-time, while welfare mothers don't, officially. It seems unreasonable to the authors of this report to exempt welfare mothers from work requirements when so many nonwelfare mothers join the work force. But the authors overlook the fact that these working mothers overwhelmingly choose part-time jobs near their homes and find care for their children in neighboring families. Their going to work is a reflection of familial order, not a source of it.

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We wouldn't know it from reading the trendy media, but full-time working mothers with small children are found mostly in upper-class families, in broken families, and in families in danger of breaking down. In all intact American families, wives still earn on average less than 20 percent of the family income. Indeed, there is considerable evidence that the more earning power commanded by a wife, the less fully she is likely to exploit it and the more she will prefer part-time work. Any candid look at labor-force statistics reveals that the alleged sexual revolution in employment, on which these social scientists repose such touching faith, is almost entirely bogus. In any case, the work experience of women with stable families is totally irrelevant to the struggles of poor women who cannot even find their children's fathers, or make them babysit for more than a few minutes without fear of child abuse.

What the workfare reformers will get for their pains is a two-tiered day-care system with one tier called "job creation." One set of welfare mothers will work in the day-care center, watching other welfare mothers' children, while government supervisors watch the "working" mothers, checking them in and out, finding them "make-work."

If it were as easy for government to create jobs as the workfare advocates assume, socialism would succeed. In reality, the vast majority of the hard-core poor, as this report itself testifies, do not want to work; they want to "job" the system. To make these people exert themselves, we need tough bosses and entrepreneurs whose business survival depends on the workers' efforts. We have to be able to fire the shiftless and disruptive. Regardless of what the program's advocates say, it is politically impossible for this to happen in a government make-work program. Doesn't anyone remember CETA?

It does not help that the government jobs are intended to be a "last resort." Last resort goverment employment always becomes a first resort, since government officials cannot enforce real work attendance and effort. The jobs—like CETA jobs before them—are quickly and correctly seen as merely a "new hassle" required for getting the government money. The welfare-prone always prefer fake jobs supervised by social workers to the necessarily unpleasant demands of actual employment. Far from learning the harsh disciplines required for productive work, recipients learn that you can have a job without really working—the most crippling illusion both of the poor and of the academic and governmental students of poverty.

HIDDEN among the excellent statistical tables in this report, however, are data that do allow us to conceive of a solution to the problem of poverty in America. In the abolition of evident poverty, Japan ranks close to number one. Perhaps we can imagine an America that excels even Japan in this domain.

The "poverty line" used in this study, and in nearly all other

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poverty literature, is based on the absurd assumption that poor people must spend one-third of their money on food. (Incidentally, this is the average spent by all Japanese.) As a solution to the problem, let us imagine a population of American poor who can feed themselves on less than one-fifth of their incomes, as other Americans do. These American poor are physically bigger than the Japanese, so let's give them twice as much housing space. Imagine further that home ownership is possible for the poor, and that perhaps two-fifths of them achieve it (well above the overall Japanese level). Imagine telephones and color television sets in more than four-fifths of their homes, and video cassette recorders spreading rapidly. Imagine giving a car to virtually every poor person who is not perpetually drunk or in jail. Assume the poor achieve access to health care comparable to that of middle-class American families and assume further that their life expectancy at birth is over seventy years, and improving steadily. Imagine that the poor have sources of funds that astonishingly raise their level of expenditures above their reported incomes by a factor of three! Assume that unemployment is mostly voluntary and that the overwhelming majority of the jobless candidly declare that jobs are available if they want them. Assume an economy so open and free of racial discrimination that immigrant blacks are 50 percent more likely than native whites to earn over $35,000.

What you have just imagined is the current condition of the population below the poverty line in the United States today.

Nonetheless, there is no point in denying that America has some of the most wretched poor people on the face of the earth. They are poor people who cower in their homes for fear of gangs of boys in the streets; poor people who live for sex, alcohol, and other stimuli and are scarcely capable of getting out of bed in the morning, let alone going regularly to work; poor people who spend most of their money on drugs and prostitutes and rarely pay their rent; poor people who rankle and rage under any rigorous boss; poor people who burst into raucous guffaws at the very idea of sexual morality or other disciplines of civilized life. I have interviewed hundreds of these people; that is what they are like; that is the hard-core harvest of the American welfare state.

Their problem is not poverty but a collapse of family discipline and sexual morality. The reason most American men work beyond a bare minimum is to support families or to earn enough money to attract women. When families break down or fail to form and women are easily available, men drastically diminish their work effort. The result is a stagnant community, divided between the dependent and the predatory. The rest of the society pays.

THE report tries to overcome this problem with "get-tough" paternity tests for all illegitimate children and garnishments on the wages of their absent fathers. This program alone would ensure that most of these men (and boys) would stay completely out of work-

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fare and all other reported employment. Garnishments are yet another pathetic effort to substitute state power for the fabric of family responsibility. These eminent scholars seem unable to recognize that once the father has left, the battle has been lost. Work is hard and unpleasant; fathers will not long do it for children they scarcely know.

Governments only compound the damage when, in a search for the "deserving poor," they try to make up for excessive benefits with tough standards. The more the government attempts to supply the services and constraints that families normally provide in trust and faith, the more families will tend to break down. Governments simply cannot replace families—and the more they try, the worse the problem will become. All civilized societies offer welfare programs as a safety net. This safety net works best when it isn't allowed to become a snare, when the payments are low but readily available, and when no one pretends that government can solve the specific problems of the poor. As Peter Drucker declares, successful managers don't solve problems, they pursue opportunities. The broken families of America constitute an insoluble problem that can absorb nearly infinite funds and efforts and provide a pretext for unlimited governmental expansion. The opportunity in welfare policy is to stop destroying families and to encourage their formation.

Years ago, in *The Public Interest*, Daniel Patrick Moynihan urged enactment of the essential profamily policy: a scheme called child or family allowances. Consisting of a monthly payment to every family for every child—regardless of family income—the plan would simultaneously counteract the long-term shift in the tax burden onto families with children and the welfare incentive for family breakdown and illegitimacy.

In France—the nation with the most fully developed program—child allowances have strengthened families and prevented poverty from becoming chiefly an affliction of children. By *supplementing* wages rather than *displacing* them, the program would reinforce the man's efforts as principal provider, and tend to keep him in his marriage. By compensating for the greater burdens of raising children, the program can help keep mothers in the home, rather than pursuing menial work that hardly pays for day care. By ending the assumption that every wage by itself must support a family, child allowances tend to reduce pressure to increase the minimum wage in ways that reduce employment for young people. No welfare program or "negative income tax" can end poverty as measured by an ever-rising poverty line. (As the welfare payments approach the line, they usurp the man's role as provider, and he leaves.) But child allowances for all can help those vulnerable families headed by a man who works full time but still cannot lift his children from poverty.

In a superb article, again in *The Public Interest*, Allan Carlson showed how the near-equivalent of child allowances could be created by an array of adjustments to current programs—expanding

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the earned income credit and tying it to family size, among other devices. With the nearly complete collapse of poor families in America, the argument for child allowances or Carlson's system of payments is far stronger today than ever before. As Carlson stresses, it is no panacea; Sweden, for example, has swamped its child-allowance program with contrary incentives for illegitimacy and family breakdown, to the point where 46 percent of live births now come out of wedlock. Yet the *Working Seminar* report not only fails to mention child allowances but even opposes a child-based earned income credit! Payments for children are a crucial first step for a welfare and tax system that will support families rather than subvert them.

THE basic reason for the unexpected failure of this study is the towering new taboo of feminism. On right and left, no one dares suggest that female-headed families are themselves a disaster —mainly because they are totally incapable of taming teenage boys. Government job programs have proven repeatedly incapable of taming boys. The only people who have a chance to tame them are fathers in the home and sexually disciplined girls outside.

So while the prisons fill up and overflow with predatory young men, while our health systems groan under the burdens of new venereal plagues, and while our social system struggles with epidemic illegitimacy, the central cities of our nation move increasingly toward a police state for the young men and a child-care state for the women and children. The media worry about the dire dangers of sexual repression while teachers wave condoms in classrooms as flags of liberation before boys and girls with hormones ablaze. Meanwhile, the only consistent defenders of real family values—conservative Catholics, evangelicals, and orthodox Jews—are derided as unrealistic. As the darkness falls, conservatives and liberals get together and whistle workfare.

It has become evident that secular Americans, conservative and liberal alike, are totally unable to defend family values. Out-of-wedlock births, now powerfully legitimized by the welfare system, must be delegitimized again, and marriage with children restored to its necessary centrality in our national life. Without a strong religious culture, a secular bureaucracy, with its rationalizing ethic, erodes the very foundations of sexual morality and thus creates the moral chaos it ostensibly combats. Even Margaret Mead recognized that in all cultures family values must be upheld by religious supports. The effort to inculcate ethical behavior without religious faith is one of the great fiascoes of the modern age. In order to relieve the pain of the poor, our society must come to recognize that their problem is not lack of jobs or lack of money but moral anarchy.

George Gilder is the author of Men and Marriage, Wealth and Poverty, *and six other books on social and economic issues.*

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Sending the Right Signal

MICHAEL NOVAK

DESPITE HIS vigorous dissent, George Gilder reinforces the main findings of *A Community of Self-Reliance* in three important ways. First, he agrees implicitly with our central point—namely, that the problem of the late 1980s is no longer "poverty" but rather "dependency," and that the problem of dependency is primarily a moral problem. Second, in the same connection, he uses the array of new statistical materials we were able to bring together (with the help of Nick Eberstadt and Karl Zinsmeister) to show that the *material* condition of the poor in the United States is far better than most commentators have observed. Third, he recommends greater attention to the *males* involved in female-headed households, a subject on which we worked hard to bring together a fuller brief compendium of information than is easily found elsewhere.

I read Gilder's helpful discussion as if he had been a member of our Working Seminar and had offered such arguments during our proceedings. Allowing for Gilder's distinctive record of involvement in such researches and his vivid and original turn of mind, the substance of such arguments as his was heard around our table. But the point of our exercise was to limit ourselves to what could be said by all of us in consensus. Beyond this, we were well aware that an intellectual consensus does not constitute a political consensus. We believe that the time is ripe, however, both for some helpful, realistic steps by the political system, and for some major steps forward in the intellectual and cultural world. Surprisingly, Gilder pretty much ignores our strong emphasis upon the latter.

But let me begin at the beginning. Our report has four parts, counting the extremely illuminating statistical appendix from which Gilder and others are now drawing so many useful insights. Part one sets forth the seven main underlying philosophical principles, now a matter of consensus, for further reflection upon the available data on family and welfare. Part two sets forth the statistical portrait of the problem of dependency and focuses this portrait (as is not often done) upon *families*. Part three sets forth seventy-odd recommendations, distinctive for emphasizing the moral and cultural dimensions of the task, and for recognizing that the political adjustments to be made by governments (federal and local) can supply only a small fraction of the necessary remedies.

As we report, 60 percent of the AFDC caseload is located in only ten states, largely in concentrated urban poverty areas. However, in the other forty states, in which the caseload is far less concentrated, significant progress might be made in reversing the general trends of the last twenty years. Moreover, states and localities are far ahead of the federal government (and, indeed, of many poverty experts

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whose focus is national) both in concrete realism and in imaginative experimentation aimed at reducing dependency. We quite agree that the worst-case problems of the hundred largest cities are the most desperate and difficult. But our aims were from the start as modest as experience suggests they must be.

Helpfully, Gilder draws a portrait, based upon our statistics, of the actual achievements by those officially defined as poor: improvements in their longevity, health and medical care; remarkably widespread home ownership among the poor; the fact that the reported expenditures of the poor dramatically exceed the income they report, etc. These are among the facts that persuaded the full Working Seminar that the issue for the 1990s is no longer "poverty," but rather "dependency."

Further, we were able to define dependency, roughly, as "an inability to cope" and, more exactly, as the inability of able-bodied, working-aged adults to achieve the independence appropriate to free citizens. Beyond doubt, such dependency has a significant moral component. Free schooling is available, but some do not take full advantage of it. No one forces citizens to injure themselves with drugs or alcohol, but significant numbers do. Citizens are not commanded to have children out of wedlock—implicating themselves and their children in highly probable self-damaging consequences, and implicating the public in substantial financial costs—and yet alarmingly high percentages of them do. Far from ignoring the moral dimensions of dependency, the Working Seminar may have been the first to spell them out both in such detail and in a consensual way.

WE NOTED that 93.3 percent of all intact, married-couple families do *not* fall below the poverty line and that, of the 6.7 percent that *do*, many seem to own their own homes, to be employed, and to be coping reasonably well. In general, poor married-couple families account for nearly half the children who are poor.

Quite different is the condition of a substantial fraction of, but by no means all, female-headed families: Only 34 percent of the female heads of households fall below the official poverty line. Not all female householders share the same characteristics (age, education, work experience, etc.). Two-thirds, for example, are older than thirty-four. By contrast, three-quarters of AFDC heads of households are *under* thirty-five and one-half are under twenty-five.

About one-third of the female heads of households who turn to welfare were likely to be on welfare for a period of three years or less, just long enough after separation or divorce to regain their stride. Some of these had college educations, prior work experience, and considerable assets. In short, not all are "dependent" in the full sense sketched above.

Of all mothers with children under age eighteen, nonpoor mothers (whether single or married) work far more than poor mothers.

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In 1984, nearly three-quarters of nonpoor mothers and children worked at least part-time; forty percent worked full-time. But only 39 percent of the poor mothers worked at all, and only 9 percent worked full-time (for at least forty weeks).

Thus, counting mothers and children under eighteen, about 11 million persons in female-headed households fell below the poverty line in 1985. Gilder directs our attention to that fraction of AFDC mothers of small children who have little education or work experience; many of them never marry, have children out of wedlock, and are highly likely to be on and off AFDC for many years. This appears to include about one-half to two-thirds of poor female-headed households, spread through rural and suburban areas, but especially concentrated in the hundred largest urban centers.

In the not-so-distant past history of this nation, there were never so many dependent mothers who were not widows, and who had had children out of wedlock. What can the people of this country do to set their current numbers on a declining slope? Short of a moral reformation, what is to be done? There is, we judged, no one simple solution, no silver bullet.

An important key is the young male, the delinquent father. Never have so many young men deserted women and the children they have fathered, and then failed to support them. William Julius Wilson focuses on the too-small pool of marriageable males. That pool is not too small to father significant numbers of children, however. A new ethos has clearly arisen, shaping the ethics of individuals. Yet an ethos that has changed rather suddenly in one direction is also capable of being changed again. To do so by using every social means available to a free people is the Working Seminar's first recommendation.

Accordingly, the Working Seminar gives an unusual degree of attention to the powerful role that has abruptly come to be played by television and other national media during the past generation. But public policy journalists, academics, and other opinion leaders also play a role in shaping the public ethos. So do mediating institutions—schools, churches, local organizations—in every neighborhood. The poor pay dearly for the free sexual ethos promulgated in recent decades.

The Working Seminar further recommends that fathers of out-of-wedlock children ought to be identified, and made to work for the support of the children they father. Such a legal requirement has a function that goes well beyond its financial implications: It signals public insistence upon the fulfillment of responsibilities freely entered into.

In the best of all possible worlds, I would certainly agree with Gilder that, on the whole, it is better for mothers to attend to their very young children wisely rather than to work. But the most persuasive reason offered in the Working Seminar for recommending that long-term AFDC mothers must also work is that, as matters

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stand, most of them appear to be living in a social isolation that is good neither for them nor for their children.

THE Working Seminar recognized that even if workfare programs were instantly geared up experimentally in every state and in every locality, tailored to local circumstances, even the best programs would reach only a fraction of the population for whom they are intended. Even then, such programs might be expected successfully to move mothers from dependency to self-reliance only in some percentage of cases. Workfare is no panacea. But it remains one of the many ways in which the public must insist, through every instrumentality available to it, that freedom entails responsibilities. Among these is the cardinal responsibility of able-bodied adults to provide for the support and rearing of their own children. Signals emanating from government, however weak government may be as an agent of sound morality, play a significant social role. Signals from the larger culture are even more important.

Gilder is correct to worry about "slippery slopes," but the Working Seminar did not, in fact, move toward legitimating "day-care entitlements." The facts seem to indicate that most mothers, poor or nonpoor, prefer to make informal arrangements for day-care through their families, friends, or neighbors. We do recommend, however, that in concentrated urban settings, young welfare mothers with children be brought out of isolation and into *social settings*, where (under the auspices of churches and other local social organizations) they can learn how to care for their children and to complete their schooling and other preparations for self-support.

Further, the Working Seminar was systematically skeptical both about the government's ability to produce real jobs and about the preparedness of significant percentages of AFDC mothers to become employable. But it did share considerable optimism about the private job market in the coming decade, both because of the "birth dearth" and the "baby bust," and because of the relatively low skills required for many entry-level jobs in service industries.

Further, it recommended intense local scrutiny of local schools to provide the discipline and excellence most favorable to the employability of their graduates, in one of the most favorable employment climates in recent decades.

In brief, our Working Seminar strove for a modest set of many mutually reinforcing steps, aimed at reducing during the next few years: the number of males who desert their women and their children; the number of pregnancies, whether aborted or brought to term, conceived out of wedlock; and the number of female-headed households dependent upon the public purse.

Complete high school. Be married and stay married. Take a job (any job, even at first at the minimum wage) and stay employed. These three classic steps for climbing out of poverty and avoiding dependency are still as effective as they used to be. To get the trend-

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lines pointed in more favorable directions, we judged, would be a task well worth undertaking by a concerned citizenry, both through government and, above all, through the broader social institutions of our culture, and through the social dynamism of the multitudes of non-governmental organizations in which a free people manages its own destiny.

Michael Novak was the chairman of the Working Seminar on the Family and American Welfare Policy. He holds the George Frederick Jewett Chair in religion and public policy at the American Enterprise Institute.

The Necessity of Moderation

LESLIE LENKOWSKY

IN 1935, the United States enacted a social program whose goal, according to the presidential task force that recommended it, was "to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society." It was, of course, Aid to Dependent Children (now AFDC), and its advocates assumed—with virtually no opposition—that providing welfare benefits to enable single mothers to stay home with their children was better than compelling them to go to work. The mothers did stay home, but thirty years later, it was not apparent that their children were better off.

The main reason was that by offering aid only to families headed by women, AFDC often made it financially attractive for husbands to leave home, thereby weakening families both economically and socially. It was, most experts thought, "an insane piece of social engineering"; the seemingly logical alternative was to replace it with a program of assistance to all needy families. In various forms, that idea became the centerpiece of welfare reform proposals throughout the 1970s.

Yet, as the results of several pilot tests showed, had any of these plans been adopted, family life would not have been strengthened. To be sure, more mothers would have stayed out of the labor force (a consequence most conservatives felt undesirable). But family-splitting would not have declined and might even have increased, as more husbands and wives learned about the assistance that would still be available to them even if their unhappy marriages dissolved.

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If there is a lesson to be learned from this experience, it is the necessity of humility when it comes to designing policies to affect those affairs of the heart that comprise family life. Neither the architects of AFDC nor those who sought to replace it wished to harm the family. Yet that is what occurred (or would have, if the reformers of the 1970s had succeeded).

Thus George Gilder's impassioned reminder that the current consensus about how to remedy welfare policy may have detrimental effects on the family is a welcome one. Indeed, the Working Seminar on the Family and American Welfare Policy itself sounded just such a cautionary note in its report. Efforts to stiffen work and training requirements, or to enforce child-support orders more rigorously are too unformed and untried to bear the weight of expectations—and public spending—that many of their proponents wish to lavish upon them. And, as Gilder argues, they may have unintended results that make the problems of dependency worse.

However, if humility is not to become despair, it is also important to understand why those who support such measures believe they might be helpful and are worth a try. Their arguments are better than Gilder acknowledges.

One, of course, is that even if not the best imaginable outcome, putting women to work (and providing day care if necessary) may be preferable to having them at home, living idly on welfare. This idea was expressed most clearly by Congress in the mid-sixties, when it created the Work Incentive Program (WIN), as a way of fostering "a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and . . . [in the belief that] the example of a working adult in these families will have beneficial effects on the children in such families." Since WIN was never properly implemented, whether it could have overcome the severe handicaps faced by the female-headed family was not tested, though any number of personal histories would suggest the outlook is not quite so bleak as Gilder believes.

BUT IN ANY CASE, that is less the issue than whether a work-related system for aiding such families is more desirable than one which only provides cash payments. So long as the money is "low but readily available," Gilder seems satisfied with the latter. However, five decades of more or less that kind of policy have produced a record that is hardly comforting; one does not have to subscribe to feminist doctrines to want to change course.

Moreover, work and training programs for welfare mothers might not be quite so disadvantageous to forming stable families as Gilder contends. As such women acquire job skills and experience, they might become less readily available to men who are (or desire to be) on the margins of the work force. At the same time, they might become more attractive to those men who do want to get ahead, but know they are likely to encounter periods when having a

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second breadwinner in the household might be essential. By thus altering the sexual options for women, workfare might cause some men to change their behavior in order to obtain mates. Even marriage and child support might come back into fashion.

Needless to say, such felicitous results are not inevitable. As Gilder rightly points out, the new consensus on welfare reform could readily degenerate into the 1990s version of CETA, with elaborate day-care and adult-education programs alongside. (One congressional committee recently proposed to pay for four years of college for welfare mothers in the name of workfare!) Rather than being a serious effort to encourage self-support, it could become just another set of programs useful for prolonging dependency.

Similar objections could be lodged against any proposed change in American public policy. Democratic government can be like that. Indeed, the welfare system envisioned by Gilder is closer to what the drafters of the Social Security Act wanted—a small, residual program—than to what they eventually got. Unless one imagines that the United States would eliminate welfare entirely (in which case there would be no welfare problem), nothing put forth to make it better can escape the risk of making it worse. Hence the necessity of moderation.

TO BE SURE, even if the new round of welfare reforms is implemented in the best possible way, much will still remain undone. As the Working Seminar emphasizes no less strongly than Gilder, the fundamental causes of poverty and dependency lie in the values and behaviors inculcated by churches, neighborhood groups, cultural heroes, and other formal or informal institutions which pervade the lives of the poor. Through the incentives it gives for certain ways of acting and through the standards of proper conduct it sets, public policy can influence these traits in important ways, but by itself is unlikely to be the answer.

Nonetheless, compared to the current welfare system, the messages the new consensus conveys—that men should support their families, that women who have no men should become more self-reliant, that welfare (not government jobs) should be a "last resort" —are more in keeping with the private values that make a real solution possible. If that amounts to whistling in the dark, at least the tune is a harmonious one.

Leslie Lenkowsky is president of the Institute for Educational Affairs.

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Facing Realities

ALLAN C. CARLSON

GEORGE GILDER criticizes the report, *A Community of Self-Reliance: The New Consensus on Family and Welfare*, for: caving in to the "towering" taboo of feminism; overstating the "alleged sexual revolution in employment"; failing to create a welfare reform plan with moral content; conducting an unthinking expansion of the welfare state; avoiding the necessary role of religion in any real solution to the welfare crisis; opposing a child-based earned income credit; and ignoring the proven success of family allowances abroad.

In several of his indictments Gilder makes incisive points. It is true that the Working Seminar's report paid relatively little attention to one aspect of the gender question. The real, corrosive job competition between minority men and minority women was not dealt with in a systematic way. The spirit of feminism probably did help push this question to the side in the name of consensus. Similarly, the report failed to disaggregate "working mothers" into full-time, part-time, and seasonal categories, and so used an inflated image as an indirect justification for workfare. This occurred despite the fact that one of the foremost deflators of the "working mother revolution"—Douglas Besharov—sat on the panel.

The Working Seminar also avoided moral criteria of the sexual sort when shaping the workfare provision. A few of us strongly favored an idea proposed by Lawrence Mead of New York University, that workfare be applied differently to the mothers of children born in wedlock. For them, a work requirement would not set in until the youngest child reached a certain age (four and six years were proposed). For the mothers of children born outside of marriage, the work requirement would set in when the child reached age six months. The attempt was to acknowledge a birth in marriage as a responsible act, deserving "insurance" protection, while casting an illegitimate birth as irresponsible. The majority of the Seminar members, though, opposed the idea. Several cited constitutional difficulties facing the plan, specifically the equal protection clause of the Fourteenth Amendment. Others labelled it structurally unworkable.

In his other charges, however, George Gilder is on shaky ground. The report, for example, plainly identifies female-headed families as one of two "major causes" of behavioral dependency (p.88). Religion is repeatedly called on as a solution to the problem (*e.g.:* "Few [institutions] can better address the current breakdown of . . . ideals of marriage, fidelity, and commitment, which is not only wreaking unprecedented devastation among the poor, but also

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steadily increasing their numbers" [p.109]). As the report clearly states, "some in the Working Seminar [including this writer] favor raising the levels" of the Earned Income Tax Credit, keyed to number of children. Others, with the results of past income-maintenance experiments in mind, warned of unintended consequences. The report, as a compromise, urges caution, but certainly does not "oppose" the idea.

The report also offers up a host of solid, essentially conservative themes and proposals that Gilder does not acknowledge: the primary need for inculcating a sense of personal responsibility among the poor (p.99); the denial of welfare benefits to minors living with their children in independent households (p.102); restraints on overly aggressive "child protection" agencies (p.103); tightened court procedures relating to crime in poorer neighborhoods (p.106); the eviction of unruly tenants from public housing (p.107). The more liberal members of the Working Seminar undoubtedly had trouble swallowing some of these recommendations, but that is the nature of a consensual document.

In the end, though, the Working Seminar's endorsement of workfare and the resulting job and day-care entitlements are the chief targets of Gilder's complaints, and the source of his puzzlement over how any real profamily conservative could support such a document.

PART of my justification lies in the modern reality of AFDC. Conceived during the New Deal as an insurance scheme for widows with children, it evolved over time into a welfare program. This unwieldy mix of insurance and welfare goals, I believe, has helped to create the long-term dependency problem concentrated among unwed, often teenage mothers. (In contrast, our old-age program separates, to a large degree, the "insurance" [OASDI] from the welfare [SSI] function.) Short of abolishing the system, how might we tackle the dependency problem? One answer is to eliminate the residual and no longer effective insurance aspect of the program, and adopt instead workfare with an identifiable punitive orientation. Gilder himself acknowledges that workfare is viewed by welfare mothers as a "new hassle." Recent local experiments, moreover, do suggest that imposing a well-policed workfare requirement does reduce the number of welfare claimants. This solution is far from perfect, and may indeed become "soft" and useless if implemented on a national scale. Yet I believe it is worth pursuing, as the report recommends, on a gradual, experimental basis, which is "neither massive nor designed for swift results."

More broadly, what is the alternative? Gilder recommends family allowances. It is ironic that he blasts the Working Seminar for recommendations "that would vastly expand the U.S. welfare state," while himself embracing a plan that would, in one swoop, transform *all* families and children into dependents of the state and

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would represent the greatest expansion of the American welfare state since Medicare.

It is true that family allowances would eliminate the "notch" problem that complicates all means-tested welfare programs; yet this gain would come at the cost of new taxes to pay for the allowances. And it is true that I, too, have been an admirer of some family allowance schemes, particularly of the elegant theories behind the concept spun by Catholic social thinkers early in this century.

Yet, recently, my enthusiasm has diminished. To begin with, it is not at all clear that they work to hold families together. Indeed, by further socializing the private family economy, family allowances work in subtle ways to weaken the material basis for family independence and integrity. Second, there is no evidence I know of which proves that child allowances have strengthened poor families in France or indeed anywhere else. If poverty rates are lower in other places, the cause more probably lies in variable population characteristics, history, and culture, rather than in the state allowance. More disturbingly, such schemes have almost universally served as wedges for enhanced state control of families. In his provocative study, *The Child and the State*, Philippe Meyer describes how France's allowance system has contributed to the "progressive destruction of society by the State." The government's allowance, he notes, comes bonded to the right of state authorities to intervene in families, thus contributing to "the reign . . . of guardianship over a family's economic behavior wielded by the authorities of social welfare until such time as the family be subdued or dislocated."

Gilder does acknowledge this last problem, and endorses a proposal of mine to expand and create tax credits and deductions, keyed to number of children. Yet it needs to be noted that these "Carlson payments," as he labels them, are targeted to income-earning families with children, with the maximum tax relief going to households earning $15,000-$30,000. The dependent poor—those mothers now married to the state—would be left unaffected.

Given this situation, and the political realities, cautious experiments in workfare seemed worth a try.

Allan C. Carlson is president of the Rockford Institute.

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How workfare really works

MICHAEL WISEMAN

AROUND MIDYEAR I counted —with the help of a computer database—the number of welfare and welfare/work articles that have appeared recently in major American newspapers. I covered the *Christian Science Monitor*, the *Los Angeles Times*, the *New York Times*, the *Wall Street Journal*, and the *Washington Post*. Over the period 1983-86 these five papers together ran an average of 357 articles a year on welfare. Of these about twenty-one articles a year explicitly used the term "workfare." During the first six months of this year these same periodicals ran 194 articles on welfare, thirty-three of which discussed workfare. Obviously, welfare and welfare-work programs are much in the news.

Often these stories and their wire service progeny involve announcement of some new welfare-work scheme. By now the protocol for such events is well-established. First, the current welfare system—specifically the Aid to Families with Dependent Children (AFDC) program—is declared a disaster. Second, politicians advance workfare as the solution to the welfare "crisis." Third, the details of the program remain vague, but somehow welfare recipients will have to work for benefits. And finally, the federal government agrees to foot the bill, while allowing, in the words of the President's Domestic Policy Council, "maximum flexibility for state- and

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community- based reform efforts." As elections approach it is unlikely that the frequency of such ceremonial incantations will diminish. Quite the contrary.

These things distress me because my experience indicates that they are, more often than not, a new form of welfare fraud. I have studied AFDC operations for about fifteen years now. It is my personal conclusion that on balance in most states the AFDC system does a respectable job of providing income support for families who meet its eligibility requirements and who lack the resources to provide an adequate standard of consumption for themselves. I believe there can be no "entirely new approaches" to doing this important job, because many features of the current system reflect responses to problems that *any* income maintenance scheme must address. Furthermore, I know of no successful large-scale systems of requiring work of AFDC recipients, having witnessed first hand the collapse of a welfare-work scheme, the California Community Work Experience Program, that is advertised to this day by the president as a model for welfare-work requirements. I believe that the federal government has an active role to play in income maintenance, if for no other reason than to assure good stewardship over federal tax dollars.

But all this is not to say that I oppose all workfare proposals. A sizable body of evidence indicates that some of the programs often found under the general workfare umbrella have positive consequences for employment and earnings of welfare recipients. Popular opinion mandates attention to the relation between work and welfare. When persons anxious to assure general support of the poor ignore legitimate public concerns, the political viability of all public assistance is put at risk.

I believe any candid observer must acknowledge that welfare has, along with its successes, serious problems that cannot be ignored. One is the fact that a significant number of the families on welfare today will be on public assistance for a very long time. Neither the general public nor, apparently, many recipients themselves want this to be. If there is evidence that more thoughtful work-welfare policies can reduce long-term dependency, it seems to me that it is appropriate to experiment with them.

Unfortunately, workfare experimentation presents two serious problems. One is that experiments take time. The consequences of workfare policies take years to unfold. The final report on evaluation of the very modest workfare program undertaken in San Diego in 1982 did not appear until last year; among other things the

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results show that the long-term impact of the program differed in significant ways from those apparent in the first year of operation. The practical result of such delays is that measurement of outcomes is forestalled while the political benefits of publicity are reaped. The nation has yet to see a welfare-work program proposed that could be evaluated within the term of office of its architects.

The second problem is a matter of scale. "Comprehensive" has become the premier adjective in the lexicon of welfare reform. Such programs affect the very structure of welfare, and they are implemented with the intention of covering most, if not all, of a state's eligible welfare recipients. Even when coverage is not comprehensive, publicity is. As a result it is difficult to find individuals isolated from the program whose behavior can be used as the standard against which the net effects of reform can be measured. Simply comparing welfare dependency following workfare introduction to the situation before reform is problematic, because much reform is predicated on the assertion that without change, things would have become much worse. Given this premise, even no change is good news. When one is going to hell in a handbasket, inducing one's carrier simply to dawdle is a positive accomplishment.

So how do we separate the sound proposals from political hyperbole? How do we root out this new form of welfare fraud in a timely fashion? Think about the work test. The crude conception of what workfare is about envisions a citizen handing a rake to a welfare bum and saying "If you're really needy, you'll use this in return for your check." I would like a "rake test" for workfare proposals. I want those who are anxious to leap on the workfare bandwagon to show evidence of having thought about the problem of designing and implementing such systems.

The essence of workfare

The term "workfare" seems now to be applicable to any program in which income maintenance is explicitly linked to employment preparation. Workfare programs are not simply systems that mandate that recipients work in exchange for benefits. Rather they are processes, steps certain welfare-receiving adults are expected to take in connection with benefit receipt. While programs differ substantially in detail, most are variants on the simple scheme that I have outlined in Figure I.

Briefly, this generic workfare model goes as follows: My name is Alice Jones. I am a single mother with a child in the first grade. My former husband has ceased to pay child support, and I have lost my

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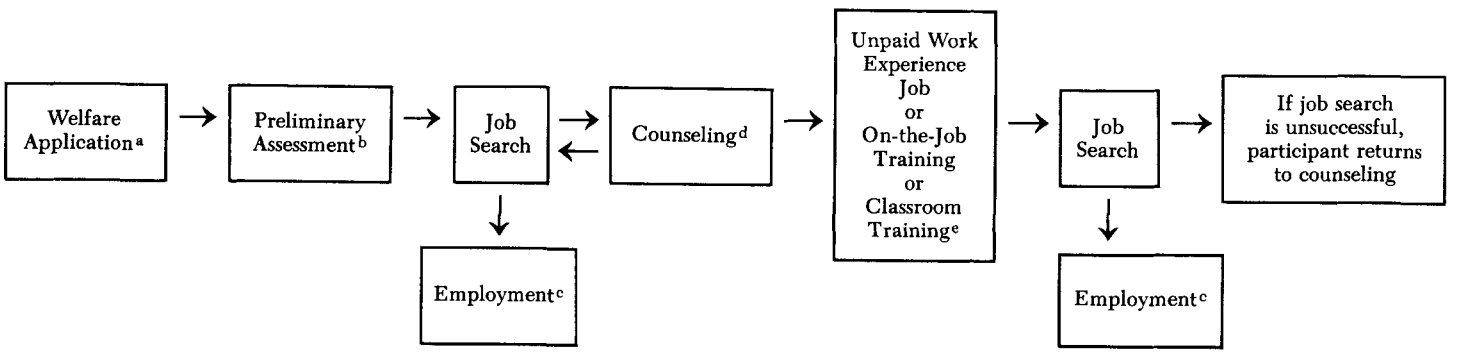
Figure I: The Workfare Process



[a] The point in the welfare application process at which the applicant is enrolled in workfare varies from program to program.

[b] Supporting service needs (child care, transportation, etc.) are determined here. Motivational counseling and training in interview techniques are also often included. Some participants may skip the initial job search.

[c] Employment can occur at any time in the workfare process.

[d] Generally more thorough counseling, which includes an assessment of barriers to employment, is done here. Some programs establish a services "contract" with participants.

[e] A great variety is possible here. A "work experience" assignment is rarely a participant's initial activity.

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job. I apply for public assistance. Because my situation (my child is in school, so my child-care needs are minimal) obligates me to participate, I am directed to register for the program. Inevitably the program has a neat acronym, something like "ET (for Employment and Training) Choices" or "GAIN" (for Greater Avenues for Independence), or "Dole-Out" (undoubtedly proposed in Kansas).

I meet with a caseworker who reviews my employment background and describes the Dole-Out program to me. At this point I am told that I will be assisted in some number of weeks of job search activities. If I need child-care or transportation assistance for this effort, it can be arranged.

The next step is some weeks of looking for a job. How this is carried out will depend on the program. In some instances I will be on my own, but I will be expected to report at regular intervals to a search supervisor. In others I will do at least part of the work in a group with other jobseekers. If I find a job, I'm out of the workfare track. Whether I'm off welfare will depend on what the job pays.

If I don't find a job, eventually I go to another counseling session. At this stage a more detailed attempt is made to assess why I haven't been able to find employment. Eventually an agreement is struck that is essentially a plan to enhance my employability. This plan can involve classroom training for particular skills, on-the-job training with private- or public-sector employers to which my welfare grant is "diverted" to subsidize my wages, or "work experience" in an unpaid job with hours determined by the program.

When I complete my employability enhancement program, I begin another period of job search. If that fails, I'm recycled—that is, I return to one of the counseling points.

If at any stage in this process I balk, I can be "sanctioned." In practice this means I will first be counseled about the reasons for my recalcitrance. If counseling doesn't work, part of my discretion in money management might be taken away—for example, the welfare office may start paying my landlord and deducting the rent from my check. Eventually I will lose the portion of my AFDC check attributable to me, but I will still receive benefits for my child. (Remember, I am talking here of a generic workfare program, and these details may not be present in specific examples.)

Old workfare, new workfare

In practice most caseflow charts are far more complicated than Figure I. Last year one wag compared the chart for California's GAIN workfare scheme to "a diagram of the Chernobyl nuclear

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plant." (The author failed to identify whether he was referring to Chernobyl *before* or *after*.) But that's a cheap shot born of the unfortunate tendency of freelance policy critics to assume that the same medicine is appropriate for all. Some welfare recipients benefit from counseling and major service provisions. For others excessive bureaucratic interference may prove counterproductive.

The workfare system described above does not differ significantly from the second generation of the Work Incentive Program, which was started in 1972. Yet workfare advocates emphasize several innovations:

(1) *Resources*. Past programs have been continuously plagued by shortages of funds and staff for serving all eligible persons. Most workfare plans promise more.

(2) *Work Requirement*. The model program sketched in the diagram includes a work component, a "Community Work Experience Program." While often proposed, such programs have rarely been implemented, and with the possible exception of Utah's WEAT (Work Experience and Training) program, those which have been initiated have failed to live up to proponents' expectations. A CWEP is not essential to workfare operation, and such components are not present in all workfare programs. An obligatory program makes the job search and training the "work" required of recipients.

(3) *Process*. An important distinction between the new workfare and previous welfare-work systems involves what I call the *schedule*. While previous welfare-work programs may have included many of the elements of the model workfare system described in Figure I, in practice most programs have been small relative to the eligible population; because of this, participation was largely optional for most participants. The timing of service delivery was haphazard at best. The new workfare programs attempt to closely integrate the income maintenance and employment activities and to increase participation rates to include virtually all eligible adults meeting specified criteria. This participation occurs at a predictable time following program entry.

(4) *Philosophy*. Finally, and perhaps most importantly, these programs emphasize a change in philosophy. Workfare changes the nature of the welfare bargain. It does this not simply by conditioning welfare receipt on work, as in the simplest of work requirements, but by conditioning welfare receipt on participation in a detailed, supervised program of preparation for self-support. Willingness to participate in such efforts in effect becomes a test of need for public assistance.

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Policy analysts commonly emphasize the new obligations workfare programs impose upon recipients. But workfare programs also create a new obligation for the state. Just as recipients in a welfare program expect to get checks, so do recipients in the ideal workfare program expect to participate in a structured employment program. Opponents of workfare programs have too often missed the boat on this point. Delivering what is contemplated by the system I have just sketched is a daunting task.

Can the system deliver?

My point is that "Will workfare work?" is not currently the principal issue. It's not even a well-defined question, because workfare can mean so many different combinations of things. The real issue is, "Will the welfare system work for workfare?" Put differently, "Can the system deliver?" If we can answer this question affirmatively, we can then assess the consequences of workfare. Put formally, I want to shift attention from product to process. I think this offers the greatest immediate hope for disciplining the mob of workfare dilettantes.

So just what is the bureaucratic equivalent of the rake test? What does one look for to work-test workfare? In my experience four questions are sufficient to get to the heart of the matter. These are: (1) Who's running the show?; (2) Where is Alice Jones?; (3) What are they doing at 2:00 p.m.?; and (4) What are the questions at 1 West Wilson?

Test 1: Who's running the show? Workfare has to be delivered at the local level. It is possible to mail checks from state capitals like Sacramento or Madison, but it is not possible to manage job search or training programs from there for recipients who live in Bakersfield or Janesville. Think about it: What creates glory and press in Sacramento and Madison must be delivered by people slugging it out in Fresno and Beloit.

At the local level, responsibility for employment and training services has historically been distributed over several agencies, including the local office of the state employment service, a training services delivery organization now often called the Private Industry Council, local vocational institutions, and private or private-nonprofit service delivery agencies. Most of these agencies receive at least part of their funding from sources other than county government. The Private Industry Council, for example, receives federal funds allocated to the state by the Jobs Training Partnership Act and uses such money to pay for a variety of training programs.

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Under existing (pre-workfare) arrangements, each program can serve different sets of recipients with outcomes that are largely haphazard. Record keeping remains extremely fragmented, with separate files maintained on the same recipients in as many as four places.

What I have described as the goal of workfare requires vesting considerably more authority in a single case management unit responsible for tracking cases and contracting with other agencies for service delivery. The question must be asked: Does such a unit exist? If so, does it have the authority to "run the show"? We can examine the management unit's relationship with the local Private Industry Council. Has the state taken steps to ensure that the PICs deliver a certain percentage of their training positions for welfare department use? What happens to the PIC that doesn't? If the answers are "no" and "nothing," program architects have denied program operators the tools needed to do the job.

Test 2: Where is Alice Jones? The second test concerns case management. If system managers perform their duties, then someone should know the status of each case in the workfare progression. Someone should keep track of Alice Jones's progress in the employment preparation program.

Two test methods present themselves. One could simply choose a recipient from the list of checks and see how long it takes his or her income maintenance caseworker to find the information. In an integrated system there is one caseworker to talk to and one file to look at to obtain this information. A second version of the test is even more telling. Suppose that I describe Alice Jones to a program manager in the county welfare office just as I described her earlier to you. Suppose I add the provision that she has been receiving assistance for six months. What can the program manager say with confidence has happened to her? In a tightly managed workfare system, managers can either say for certain, or they can say for certain given one or two more provisions: "She has completed job search and is undergoing pre-training counseling unless she proposed a training plan on admission." Can our manager do so?

So far, California's GAIN program fails Test Two. According to the first GAIN evaluation report, "The early experience of the nine counties that had begun the implementation of GAIN by the end of 1986 suggests they have had difficulty monitoring the activities of program registrants." Without monitoring, enforcement of participation requirements is impossible. In part because of these problems, during the first year of operation not one GAIN participant

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was sanctioned for noncompliance. The Manpower Demonstration Research Corporation (MDRC), the firm hired to evaluate the program, reports that GAIN staff identify widespread problems with failure of recipients to show up for required activities. However, most counties have only been active for three to four months, and better performance may be achieved with experience.

Test 3: What are they doing at 2:00 p.m.? The use of required work assignments attracts much attention. Experience seems to indicate that the problem with work assignments is not that such jobs turn out to be onerous for recipients, but rather that they are difficult to produce. Consider the requirements: The jobs filled need to produce something, they must be managed in a way adapted to high turnover, and they must be operated in a style consistent with regular private-sector employment.

The question posed here checks on the quality of the job. I think the test is not appropriately applied at 9:00 a.m., although that is when one will observe whether the work is taken seriously enough that the providing agency requires people to be on time. I like 2:00 p.m., because many of these part-time jobs close before school lets out, and the real test of organization is whether or not a recipient can be kept busy all day. A good case of what ought *not* to happen was reported last spring in the *New York Times*. The *Times* found a group of women in the South Bronx who reported to workfare assignments at 7:00 a.m. Their job was to make sure that soap and toilet paper dispensers were filled in the restrooms at the city welfare office. The work, the recipients reported, is generally done in about an hour. "The hardest thing we do is get here," one recipient told the *Times* reporter. Then another added, "And the next hardest thing is finding someplace to hide. There's nothing to do." New York fails the test.

Test 4: What are the questions at 1 West Wilson? The fourth test reflects the fact that workfare is a state program, operated locally. I choose 1 West Wilson (the location of Wisconsin's Department of Health and Social Services in Madison) to represent the state bureaucracy. It could be 744 P Street or 233 Jefferson or wherever, depending on the state. What is the state's role? What should be going on in these places in the midst of workfare implementation?

To begin with, all of the usual activities stay in effect. The state is ultimately responsible for quality control. AFDC is operated under the state's plan, and local operations must conform to it. While local variation remains an essential element of workfare, this variation must be limited. Without supervision, a state with seventy-two

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counties will reinvent the wheel seventy-two times. Some structure must be dictated, and it is essential that systems be set up that allow exchange of information on operation.

Part of this information involves assessment of the consequences of workfare components. Local authorities need to experiment with these, and the experiments must be carefully designed and executed. For any one county, the costs of such work will most likely exceed the benefits. But in some cases, if benefits to all the counties involved could be counted, the costs could be justified. This is where the state must step in. To encourage such work, the state subsidy for experimentation must exceed the state subsidy for regular operations.

Counties need guidance concerning where to experiment. There are many operational issues that should be addressed experimentally. One concerns the effectiveness of various programs, including alternative techniques of searching for jobs. Research is also needed on the consequences of changing the coverage of the system, in particular on the results of extending the workfare obligation to mothers with preschool children. A third involves the intensity of the program's emphasis on obligation. How quickly should participants be sanctioned when they fail to keep the schedule? We also need to know more about what administrative arrangements best establish the authority of the system—the problem addressed in Test One. A state administration committed to workfare should be wrestling with all these questions and should have plans for information collection and dissemination in each area. Local authorities who assist should be rewarded. If the sponsoring state agency does not provide guidance and support for experimentation, the state is not serious. The daring innovation is a sham.

The Test Four problem finds a vivid illustration in Wisconsin. In January 1987 that state initiated a pilot welfare-work program called WEJT (for Work Experience and Job Training) in five counties. The state government gave the counties broad guidelines to follow in implementing the program, but for the most part design and operation were left up to local administrators. Virtually no state technical assistance was provided. Not surprisingly, most sites quickly encountered administrative problems. One county, Kenosha, found that it could not induce its WEJT subcontractor, the local Private Industry Council, to provide information on what was happening to program participants. When Kenosha requested state financial assistance in securing management consultation for program design and operation (and for recontracting with the PIC),

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state officials balked at the estimated $60,000 cost. Wisconsin's AFDC program costs $600 *million* per year; costs in Kenosha alone are some $21 million. While approval for the $60,000 outlay (which will be largely federally subsidized) was eventually obtained, the importance attached by state agency leadership to coordinated research and assistance in management remains a matter of doubt. So far, Wisconsin fails Test Four.

Other tests

A number of other tests are popular but misleading. The "Can you find a recipient who took a job?" test underestimates the initiative of poor people. The good workfare reporter diligently seeks out examples of recipients who have found jobs and who have subsequently left public assistance; such stories are the stock-in-trade of workfare publicists. But the premise of these tales seems to be that before workfare, welfare cases never closed and that no one ever observed diligent, indeed occasionally heroic, poor people finding a route to self-sufficiency. In fact such cases were not hard to find at all, and they are still apparent in localities without workfare. To make too much of the fact that welfare cases close is to pay undeserved homage to the worst of the welfare stereotypes—the image of all welfare recipients as persons lacking the skills to succeed in the real world. In the San Diego workfare experiment only about 53 percent of applicants to welfare not assigned to the workfare program were receiving public assistance in the third three-month period following original application. The rate was just 5.7 percentage points lower than this for the group that was routed into the program—yet this was the time interval for which the control/experimental differences were greatest.

A second misleading test involves asking recipients whether or not workfare services were beneficial. Last spring the *Times* found a recipient in Michigan who denied that participation in the "Job Club" component of that state's workfare program had helped in finding her bakery job. She had in fact located the job through a friend: "They (the state's welfare department) didn't do anything for me," she said. The *Times* reporter apparently failed to inquire whether the friend had been contacted for job leads before the workfare program established the obligation to look for work as part of the welfare contract. For some people the workfare process does increase the cost of public assistance; they are certain to be disgruntled. Such complaints need not mean the program is failing.

There are many other things that one might look for. But a state

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program that addresses local administrative problems, creates incentives for tight scheduling of operations, recognizes the importance of planning, management, and overhead in Community Work Experience, and undertakes to answer the key research questions certainly demonstrates a commitment to an active and positive welfare policy.

I close with one last test. This one ought to be applied to the federal government as well. I was once asked by a California assemblyman if I had the welfare "magic bullet"—the lethal policy that would make what he called the "welfare problem" go away and leave him alone. Workfare policies often seem to be promoted this way, as the Final Solution. But while available research indicates that the various programs incorporated in workfare systems have in some instances had statistically significant effects on recipient earnings and movement to self-support, the actual magnitude of the effects is not great. Given the resources that go into them, workfare programs may help some recipients move toward self-support and lead to small reductions in the welfare caseload, but the caseload won't vanish. Politicians who claim major effects for workfare policies suffer from what I call the "magic bullet syndrome."

We should not expect workfare to be the final solution to any welfare problem because the scope of workfare programs is too narrow. Workfare policies operate only *within* the welfare system. Trends in welfare caseloads and case closures are also affected by what goes on outside the transfer system. The most promising policies for long-term welfare reduction concern just such changes: in systems for assuring that absent parents support their children, in systems for earnings support through policies like the Earned Income Tax Credit, in improvements of public education, and in provision of health care to working low-income people without adequate health insurance. Given the importance of the opportunities in these areas, dropping everything else for workfare is wholly unjustified. Thus the last workfare program test: Reporters, ask the welfare administrator or the governor or the senator or the president, "What *else* are you doing?"

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Not all female-headed families are created equal

DOUGLAS J. BESHAROV & ALISON J. QUIN

FOR SOME TIME NOW, we have been hearing about "the feminization of poverty," a process brought on by the deterioration of families, which leaves single women and mothers destitute. And indeed, there is substantial evidence that women are more often the victims of poverty: Almost half of all female-headed families with children under eighteen are below the poverty line and three-quarters of those families who begin receiving AFDC (Aid to Families with Dependent Children) do so because they have become female-headed families.

But not all female-headed families are created equal. The feminization of poverty is both not as bad as, and much worse than, these statistics suggest. Families headed by divorced mothers are doing much better, generally, than is commonly supposed, and families headed by never-married mothers are doing much worse.

Compared with divorced mothers, never-married mothers experience more severe poverty, for longer periods. They work less, receive less child support, and are less likely to marry and stay married to someone able to support them and their children. As a result, they go on welfare in large proportion—and stay there. While divorced mothers on welfare typically use it as a temporary crutch until they get back on their feet, never-married mothers tend to

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become trapped in long-term dependency. Indeed, the evidence is mounting that never-married mothers compose the majority of long-term welfare dependents—a permanent underclass.

Lumping all female-headed families together and then trying to meliorate their poverty problems, as is so often done, obscures the real issues and distorts policy responses. To assist female-headed families in becoming financially self-sufficient, social welfare policies must distinguish between these two types of families and the problems they face.

The "feminization" of poverty

Income statistics for female-headed families with children under eighteen do indeed paint a gloomy picture. The median income of female-headed families is about 26 percent of that of intact families. In 1984, the median family income for children living with both parents was $29,730, and for children living with their father only it was $20,024. But for children living with their mother only, median family income was $7,608.

Whether one looks at the total number of people or of families living below the official poverty line, female-headed families account for a disproportionate share of the poverty in this country. In 1985, of the 33,064,000 Americans living below the poverty line, half were from female-headed families (16,365,000). This figure includes members of unrelated subfamilies living with female-headed families. When only related family members are counted, there are 11,600,000 poor persons in female-headed families—about a third of all poor persons in the country. Similarly, of the 7.2 million families that fell below the official poverty line in 1985, about half were female-headed families (3,474,000). Ninety percent of these families (3,131,000) include children.

In 1985, female-headed families with children under eighteen were almost three times as likely to be poor as other families with children. For all families with children, the poverty rate was 16.6 percent. For female-headed families with children, it was 45.4 percent. While female-headed families accounted for only about 21 percent of all families with children in 1985, they made up 56 percent of all such families that fell below the poverty line. As Irwin Garfinkel and Sara McLanahan have stated: "Families headed by single women with children are the poorest of all major demographic groups regardless of how poverty is measured. Their economic position relative to that of other groups, such as the aged and disabled, has actually declined during the past two decades." The relative poverty

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of female-headed families should not be surprising. As a report of the House Ways and Means Committee has pointed out: "Family composition . . . serves as a very rough proxy for the social, economic, and personal resources which the family as a whole can amass to meet its needs."

The poverty caused by family breakdown extracts a high price of suffering from the mothers and children involved. But society also pays a high cost. In 1984, about 60 percent of female-headed families were receiving AFDC or another means-tested benefit. In 1983, fully 84 percent of the children on AFDC were eligible because their mothers were unwed, divorced, or separated.

Family breakdown and poverty

Family breakdown—whether caused by divorce, separation, or illegitimacy—is now a major cause of financial instability and poverty in this country. This is a new form of poverty—not caused directly by racial discrimination, and not caused by structural deficiencies in the economy, but rather by a major—and troubling—change in the behavior of American parents. Blanche Bernstein has commented:

> What is undeniable is that the causes of such poverty are different from what we have known and dealt with successfully in the past. It is no longer almost exclusively either high unemployment, though the current rate (7.2 percent in June 1986) is too high, or low farm prices, although farmers are now having a difficult time and some are going bankrupt. Nor is it, to anything like the same extent as in the past, old age, widowhood, illness, or disability. Rather, the new poverty, to a considerable degree, reflects patterns of social behavior that seriously constrict the family's or individual's potential for achieving even modest success.

Over the past twenty-five years, the number of female-headed families has tripled. The Working Seminar on the Family and American Welfare Policy found that "Census Bureau data show that if the nation had had the same proportion of female-headed households in 1985 as in 1959, there would have been about 5.2 million fewer persons in poverty. A special analysis by the Census Bureau showed that the poverty rate for black families would have been 20 percent in 1980, rather than its actual 29 percent, if black family composition had remained as it was in 1970." After analyzing inequalities in wealth, John Weicher and Susan Wachter have concluded that "what appears to be an economic problem is probably better described as an economic manifestation of a social problem."

There are two separate components of this "social problem": divorce and illegitimacy.

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Post-divorce poverty: During most of the past century, the divorce rate increased slowly but steadily. Then, about twenty-five years ago, it accelerated rapidly. Between 1960 and 1980, the annual number of divorces almost tripled, from nearly 400,000 to nearly 1.2 million. The annual divorce rate is twice that of twenty years ago. (After reaching an historic high in 1979, the divorce rate leveled off in 1980-1981, dropped slightly in 1983, and has now begun to rise again.) At present, one in eight marriages ends in divorce. But if the current divorce rate continues, nearly half of all marriages established today will end in divorce.

The third-party participants in this high divorce rate are the children. Since 1972, a million children a year have experienced a divorce in their family. By the 1990s, some estimate that one-third to one-half of all children will have experienced parental divorce before they turn eighteen.

Divorce can be a positive step in many families—for example, by ending a violent or hostile home atmosphere. But it can also have a devastating financial impact. Married women who became divorced or separated between 1971 and 1978 suffered an average drop in real family income of over $10,000. Gregory Duncan and Saul Hoffman have reported that in "the first year following a change in marital status, the family income of women who do not remarry is 70 percent of its previous figure; five years after a divorce or separation, the ratio for those still unmarried is 71 percent. Especially hard hit by divorce are black women, whose incomes fell to 54 percent of their predivorce level." Garfinkel and McLanahan have explained that "because two separate households are more expensive to maintain than one, we would expect both parties to experience a drop in living standards after a divorce, but the drop for divorced mothers is much greater than the drop for divorced fathers." In fact, Lenore Weitzman's study of the economic consequences of divorce, based on California court records, found that divorced women and their children experienced a 73 percent decrease in living standards while the fathers enjoyed a 42 percent *increase*.

Out-of-wedlock poverty: If anything demonstrates the breakdown of the traditional family, it is the startling rise in out-of-wedlock births. The incidence of out-of-wedlock births is at the highest level ever observed since national statistics were first collected on the subject in 1940. The number of births to unwed mothers rose from 141,600 in 1950 to 770,355 in 1984, an increase of 444 percent. The number of live births to unmarried women per thousand unmarried women of childbearing age has more than doubled

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since 1950, from 14.1 births per thousand unmarried women to 31.0. The fraction of children born out of wedlock rose from one in twenty-five in 1950 to one in five in 1984.

Never-married mothers are much poorer than their divorced counterparts. In 1985, the mean family income for never-married mothers with children under the age of eighteen was $6,225, less than half the average income of divorced women with children, $13,281. The median was $4,623, compared with $11,149 for divorced mothers. In 1983, fully 69 percent of never-married women with children were below the poverty level, compared with 44 percent for divorced or separated mothers.

Never-married vs. divorced mothers

What accounts for the fact that never-married mothers are so much poorer than their divorced counterparts? Seventy percent of all out-of-wedlock births occur to young women between the ages of fifteen and twenty-four. Never-married mothers are, on average, ten years younger than divorced mothers. The average age range of never-married mothers is twenty to twenty-nine; for divorced mothers, it is thirty to thirty-nine. (The age spread for this second group is lowered by the fact that many divorced mothers are formerly unwed mothers who are subsequently married, but for a short time.) Never-married mothers are also, on average, much less educated. Only 53 percent of never-married mothers have a high school diploma, as compared with 77 percent of divorced mothers. Thus, inexperience and lack of education combine to give these women much poorer job prospects.

Labor force participation is the most telling difference between divorced and unwed mothers. While 63 percent of all divorced mothers work full-time, only 29 percent of never-married mothers do so. (An additional 11 percent of divorced mothers work part-time compared with 8 percent of never-married mothers.) Thus, never-married mothers work 54 percent less than divorced mothers. Since work is the primary source of income for female-headed families, the low rate of labor-force participation among never-married mothers helps explain why their income is so low.

Child support is another difference. Never-married women are much less likely to receive child support from absent fathers than are divorced women. In 1983, 76 percent of divorced women had child-support awards, compared with only 18 percent of unwed mothers. Furthermore, the average award to never-married mothers was only $1,241 per year, while the average for divorced moth-

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ers was $2,641. (The average amounts actually received were $860 and $1,901, respectively.) This difference in awards and payments is largely explained by the fact that unwed fathers, like unwed mothers, are on average younger, less educated, and poorer than their divorced counterparts. In addition, the legal system systematically protects the unwed father's ability to start a new family at the expense of his first family—after all, there is always welfare to fill the gap.

Marriage is an important solution to the financial problems of single mothers. But here again, never-married women fare worse than divorced women. Never-married mothers do have a higher marriage rate than divorced mothers. (The House Ways and Means Committee has reported that "within two years after a first birth out of wedlock, more than 50 percent of women have married. But it is only after five years that nearly the same proportion of divorced or separated women have remarried.") Divorced mothers, however, have much more stable second marriages. As of 1985, only 16 percent of the divorced women who had remarried were divorced again, according to Arthur Norton and Jeanne Moorman, in comparison with 27 percent of the women who had married after an out-of-wedlock birth. Furthermore, although never-married women in general are more likely than divorced women to marry, for women on welfare the situation is reversed. According to Mary Jo Bane and David Ellwood, "women who enter AFDC after being wives are far more likely to exit by becoming a wife again than are unmarried women who enter when they have a child." And marriage is the principal means of getting off welfare. According to Ellwood, marriage accounts for 34.6 percent of all exits from welfare, while earnings increases account for only 21.3 percent.

Welfare dependency

These social and economic differences between divorced and unwed mothers translate into different rates of AFDC use. A much higher proportion of unwed mothers go on welfare than do divorced mothers. Nick Eberstadt has calculated that in 1982 almost three-fifths of all out-of-wedlock children in the United States were on AFDC, compared with just under a third of children of divorced mothers. Children of never-married mothers are three times more likely to be on welfare than are children of divorced mothers.

It has been clear for some time that there are two distinct categories of welfare recipients: those who use it as a stopgap, and those who become long-term dependents. According to a recent study by

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David Ellwood, about half the new entrants to AFDC will be off welfare within four years, most within two years. The other half are on for longer—on average, almost seven years. Moreover, nearly 25 percent of AFDC recipients stay on for ten or more years.

In an effort to understand the problem of long-term welfare dependency and reduce AFDC program costs, a number of researchers have sought to identify the characteristics of long-term recipients. Charles Murray's 1986 study for the Working Seminar on the Family and American Welfare Policy examined the impact of age on poverty and welfare dependency rates. Using the University of Michigan's Panel Study of Income Dynamics data, he found "persistent signs that women who came onto AFDC as single women and those who came onto AFDC after a marital breakdown respond to AFDC in quite different ways." Murray's data set was not large enough to reach a definitive conclusion, but a calculation based on the data available to him indicated that never-married mothers spend an average of two and a half years longer on welfare than do mothers who had been married at some point. (Many of the latter, of course, were unwed mothers who subsequently married, for however brief a time.)

Murray's findings are borne out by a 1986 study by Ellwood, which looked at the impact of different variables associated with long welfare spells. Ellwood found that "the single most powerful predictor of durations, when all else is not held constant, is marital status. Almost 40 percent of the women who have never been married when they begin to receive AFDC will have total welfare time of ten or more years, while less than 15 percent of the divorced women have such long welfare times." Ellwood has also estimated that never-married women who go on AFDC stay on for an average of 9.3 years, while divorced women stay on for an average of 4.9.

A recent study of welfare dynamics among teenage mothers by Gina Adams of the Congressional Budget Office confirmed these findings. According to Adams, "Of the three characteristics examined [age, race, marital status at birth of first child], being unmarried at the time of the first birth is most consistently associated with both an increased likelihood of entering the welfare system within a few years of giving birth, and a decreased probability of leaving it within the first few years of welfare receipt. . . . Half of the young mothers who were not married when their first child was born started receiving welfare within 12 months after they gave birth, compared to 7 percent of those who were married. These proportions rise to 73 percent and 22 percent, respectively, by the end of the fourth year after birth."

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Thus, of poor female-headed families, it is those that begin with an out-of-wedlock birth that result in the deepest poverty—and the bulk of long-term welfare dependency. Many of these families move out of poverty; most do not. The plight of the children in these families is deeply distressing.

Different problems, different solutions

Of all children born in 1980, most predictions are that if present trends continue, 60 percent will spend part of their childhood in a family headed by a mother who is divorced, separated, unwed, or widowed. Some social scientists predict that things will be even worse in the next generation, with half of all children born out of wedlock, and half of all children born to married parents experiencing divorce before they are eighteen.

Divorce and out-of-wedlock births already impoverish hundreds of thousands of female-headed families. They are the root causes of the "feminization" of poverty, a serious national problem that requires sustained attention. There are, however, marked differences in the depth and duration of female-headed family poverty. These differences correspond to the different reasons for the creation of the female-headed family. Divorced mothers and their children suffer less severe poverty for shorter periods than do never-married mothers and their children.

Which is not to say that post-divorce poverty is not a serious problem; it is. But much more than a divorce, an out-of-wedlock birth to a young mother is a direct path to long-term poverty and welfare dependency.

Whatever the moral implications of our high illegitimacy rate, its economic consequences are a matter of urgent concern. It is one thing when a movie star has a baby without a husband to help support it. It is quite another when a teenager or a young mother on welfare does. The difference, to put it sharply, is money.

To be successful in reducing dependency, welfare policies must distinguish between these two types of female-headed families and the problems they face. As Charles Murray has explained:

> A woman who comes onto AFDC for the first time in her forties is in a profoundly different situation from that facing a woman who comes onto AFDC in her teens. Apart from the many inevitable differences that go with the age gap, there is an extremely important self-selection factor at work. The woman of 45 who has her first contact with the welfare system has demonstrated prima facie—by the very fact that she lived an adult life for that many years without needing welfare—her possession of experiential, psychological, and perhaps intellectual resources that cannot be assumed in the teenager with a baby and no husband. The teenager has

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> demonstrated prima facie that she is *unable* to function in the adult world for any length of time at all. Moreover, the moral hazard associated with a woman who comes onto the AFDC rolls at 40 is much different than for a woman of 18. Her plasticity, if you will, is different. The woman of 40 is already more or less who and what she is ever going to be. The woman of 18 is at a moment that may decisively shape her identity and development.

Acknowledging this dichotomy between the life prospects of divorced mothers and those of unwed mothers is the first step toward developing policies that meet the different needs of each group. Most Americans want compassionate social welfare policies. Therefore, if there is to be professional and political support for such policies, it will do no good to use the behavioral differences between the groups to blame one or the other—or ignore their pressing needs. Both groups deserve our concern; but it must be a concern informed by knowledge.

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Men's clubs, women's rights

ROGER STARR

THIRTY YEARS AGO, and for at least thirty years before that, men's clubs were the butt of sardonic and yet, on the whole, gentle humor among sophisticated men and women. In *New Yorker* cartoons, occasionally in movies, sometimes in magazine advertisements, the public was invited to peer through the plate glass windows of the clubs to see a vanishing world captured for an instant before its final extinction. In it elderly gentlemen snoozed away their days while meticulously trained manservants kept cigar ashes from burning their striped trousers. The power of these obsolete captains of industry and finance had been so eroded by waves of populism generated by the century of common men that it was possible to look at them with tolerant wonder and the sense of security with which one looks at stuffed dinosaurs in a museum.

And now in the 1980s, the clubs have suddenly come back to life and strength. Looking through the same windows, passersby may see nothing but the same or remarkably similar gentlemen napping. Passersby are not deceived, however. Thanks to feminist leaders and their male sympathizers, to civil rights organizations, to local politicians, conscientious legislators, social scientists, and students of government administration, the progressive urban world now knows that malign power lurks in those clubrooms. The march to

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equality between the sexes cannot continue at an acceptable pace until a way is found to open membership rolls to women. Luckily the means to do so, if necessary through legal action, are at hand.

Although some complications that may follow the legal offensive against men-only clubs can still not be foreseen, there were hints ten years ago that the movement to force a change in their policy, intense though limited in scope, was forming.

I recall the astonishment with which, some years ago, I heard from Ada Louise Huxtable, then a colleague at the *New York Times*, that her career had been blighted because, as a woman, she could not become a member of New York City's Century Association, a private men's club.

At that time, Mrs. Huxtable had not yet become a MacArthur Foundation fellow, a signal honor, but she had long been the architectural critic of the *Times*, a description that hardly hints at the respect, even awe, with which she was received as the virtual dean of the nation's architectural critics. She had been elected to membership in the American Academy of Arts and Letters, and was invited every year to make innumerable speeches at colloquia, organizational meetings, and institutions of higher learning, twenty-seven of which have awarded her honorary degrees, according to *Who's Who in America* for 1987-88. Her articles were and are sought by national and international magazines; her books achieved critical and commercial success.

I found myself pondering the nature of the invisible blight on Mrs. Huxtable's brilliant career, and how she knew that the Century Association was responsible for it. Her complaint would now be almost commonplace, but at the time I did not recognize that what I heard was an early shot in the war against men's clubs.

Since that time, complaint against the exclusion of women from joining men's clubs has moved from the dinner party to the legislative forum to the courtroom. It is worth noting, if only in passing, that no similar attention is being given to women's clubs that exclude males. More remarkable is the fact that despite their power, acknowledged by their critics to be a major reason for demanding their reconstitution, in many places many former men's clubs have been persuaded or forced to open their rolls to women since the campaign started.

It is not so clear that the change will help the generality of women to achieve any specific goal, whether to improve their status or income, to sweeten the relationship between the sexes (whatever that may mean to anyone daring to use the phrase), or to turn exclu-

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sive clubs into better places (an equally indefinite ambition). Nor is it even clear that gaining membership is the goal of most of the people demanding change. For not a few of them are men who are already members of such clubs. Nor have women who aspire to membership explained whether they admire the clubs as they are or are driven by the urge to change them. The latter alternative is not implausible; some theorists advance a similar explanation to account for the mysteries of spousal choice.

It is nonetheless possible to set down some specific accomplishments of the movement. Public officials, judges notably, including members of the federal bench, have been warned that it would be unbecoming for them to continue membership in associations that discriminate against women as members. The Junior Chamber of Commerce in California was forbidden to exclude women as members in a law adopted by the state legislature, signed by the governor, and found constitutional by the Rehnquist Supreme Court. In rendering its decision, the majority pointed out that the Junior Chamber made no effort to select its members with care and discrimination and that its purpose was not social but frankly vocational —to promote better relations among business people and encourage a higher ethical standard in their dealings. The court's majority made clear its view that excluding women from such an organization could adversely affect their standing in the business community and their ability to earn a livelihood. The court hinted that it was not making a blanket determination about all clubs that exclude women, but only about the Junior Chamber in California.

Opening the club doors

New York City, zealously guarding its reputation for early action to support what its leaders conceive of as social progress, adopted Local Law 63 in 1984. Its supporters believe it will survive constitutional challenges because it provides a defensible basis for distinguishing between clubs that can be forced to admit women and those not subject to such membership supervision by local government. So far, the courts of that state, including its highest, the Court of Appeals, have agreed.

The Koch Administration has gone even further than this in singling out the kind of clubs against which it intends to move. It has instituted action against three clubs that it regards as supertargets for enforcement action. Of these three, one, the University, has capitulated in principle and announced that it will admit women as members.

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The other two, the Century, about which Mrs. Huxtable complained, and the Union League, continue to put up a show of resistance. It is also apparent that the principal target of the two is the Century.

The Century Association has entered into a pact with the city government to forestall enforcement of Local Law 63 against it unless and until its lawsuits challenging the law on constitutional grounds have been rejected. Titled a "Conciliation Agreement," the pact commits the Century to obey the law if its constitutionality is ultimately upheld by the U.S. Supreme Court, or if that court refuses to entertain an appeal from a similar ruling below. Meanwhile, the city's Human Rights Commission agrees to suspend enforcement and even to defer a demand, already served on all three super-targets, for answers to questions such as this: What fifty of your members have the largest bills for house charges?

It would take an energetic graduate student to compile a national list of governmental challenges to men's clubs that do not accept women as members. We would then know how many statutes have been passed, how many barriers lowered, how many clubs troubled by feuds between member factions advocating irreconcilable alternative policies for meeting the feminist challenge, and how many powder rooms installed, perhaps replacing billiard rooms. A second graduate student might consider a doctoral dissertation on the specifically vocational organizations that have excluded women. Have they accepted with good grace the fact that the businessman's bunch has disappeared with the businessman's lunch?

The facts, though they remain sketchy, do not yet support the theory that the nation at large considers the club issue vital to democratic survival. Without examining the extent, if any, to which middle America is sexually desegregating such mass-membership organizations as all-male bowling leagues, the paucity of news on the subject suggests that such a change is not high on anyone's agenda. And from there one might leap to the shakier conclusion that, like many other issues of interest to the leaders of the women's movement, club desegregation is unlikely to generate mass interest by less active women who generally support feminist goals but do not participate in the leadership of feminist organizations. Just as most men are not interested in joining women's clubs, most women whose husbands are Elks may be as gratified to be invited to the club for dinner as they are grateful to be left out of business meetings. If the issue remained merely of personal interest to women who might want to join men's clubs, the movement would surely not endanger

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the character and, as some members would have it, the very existence of men-only clubs that are not dedicated to vocational or business pursuits.

Yet feminist leaders are pursuing the club issue vigorously, and they can be assumed to be no more profligate of their time and energy than their male counterparts. Apparently, they invest both because they hope the club issue is not limited only to women's personal wishes to join men's clubs. In the current state of friction between the sexes, even those women who care nothing about joining a men's club can be made angry by the realization that if they did, they would be deliberately excluded by some clubs they might particularly wish to join. And when a significant number of women have had their "consciousness raised" over the issue, avoiding their enmity or winning their support becomes a significantly visible goal in partisan politics. That, in turn, stimulates the framing of a law that will not make enough enemies on the male side to counterbalance the friends made or retained on the female side.

If it were not for the interest on the part of women who never expect (or even want) to get into a club, the numbers actually involved would not win political attention. The three super-target clubs in New York are full, with waiting lists of would-be male members. Their physical facilities are already strained, and the small number of new memberships are limited to replacing losses. The Century takes, on average, about eighty new members a year, of which perhaps one-third are non-residents of the city. If, after an initial shakedown period, the Century found itself able to subject women to the same screening it gives to male candidates, it would comply with the law by admitting thirty women and thirty men a year. If the other super-target clubs did likewise, a not unreasonable supposition, less than one hundred New York City women would be able to "unblight" their careers by joining the three super-targets each year. Since the law asks only that the women candidates be judged on the same basis as the men, it can be said with confidence that they would be people already actively pursuing careers that give them satisfaction; they would not be struggling young women looking for help in finding their way in the world.

The morality of men's clubs

If only one hundred women would be admitted annually to membership in the three super-target clubs, why, then, put so much energy into an elitist and ideological campaign tangential to the interests of the four million women in New York City? Meanwhile,

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important issues like day-care center expansion and the lagging participation of women in electoral politics remain.

The quick answer is that club admission becomes an attractive issue exactly because it is elitist and ideological and thus remains entirely a woman's issue. Day care is at least partially an economic issue, of importance primarily to women of a certain income level and only to those who are mothers of young children. At the same time, as a woman's issue, it is somewhat diluted by lack of unanimity even among feminists over the role of mothers and their relationship to their children. It can also be viewed as a help to husbands, most especially to nonworking husbands.

The participation of women in elections for public office is, likewise, a complex issue. Against whom does one bring pressure to get more women to run and how is such pressure to be mobilized? How is success measured? The very women interested in encouraging others of their sex to run for public office are likely to be deeply involved not only in sexual but in party politics. If party politics is their concern, they may find that sometimes even they must apply a criterion other than sex in their choice of a favored candidate.

By contrast, admitting women to men's clubs involves no financial costs; it is undiluted by extraneous values, and does not ask its supporters to put aside other value judgments they have been accustomed to making.

These arguments may help explain why other widely discussed women's issues fail to arouse the interest of all women to an effective level. They do not explain why the club issue does arouse it. The reason, it seems, is that clubs restricted to men strike women (and sympathetic men) as a pure moral issue. Many clubs in New York City discriminate in their choice of new members on the basis of wealth, social position, race and religion, as well as sex, and hardly cause a stir among women. Such clubs are so remote from their value system that they cannot even pretend they would be interested in joining them.

The three super-targets in New York—the Century, the University, and the Union League—are singled out for attention because they ostensibly share values of the women's movement. They do not exclude members on the grounds of race, religion and national origin, not even if some of them may have done so in other times. Their membership does include men of genuine distinction in the governmental, professional, artistic, and academic life of the city. They can plead no lack of merit, no ignorance of moral issues. Such clubs cannot hide behind self-confessed amorality as an excuse for

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excluding women simply because they are women. That two of these very clubs continue at this writing to exclude women apparently in defiance of protest and legislation, marks them, in the eyes of their protestors, with a badge of shame.

The condemnation might stop there, but not even the most wild-eyed adherent of egalitarian theory can leave it at that. Not even the flagrant immorality of an exclusionary membership policy, absent other considerations, would justify the courts in ordering members of a private association to change the grounds on which they select companions. And so, partially as a practical effort to justify government intervention, feminist leaders argue that super-target clubs exclude women to maintain a job monopoly for their members in the professions, in government, and in artistic and academic life. It turns out, then, that the exclusion of women is not only galling because it is a denial of their fundamental equality, but also because it demonstrates men's fear that unless they unfairly exercise their current power, women, on merit alone, would make serious inroads on that power. This charge implies that unless something is done to break a vicious cycle of exclusion-domination-exclusion, women, of whatever social class, whatever occupation, whatever talent, will be relegated to the lower positions in a man's world.

Power politics and the law

The political situation in New York City in 1984 made inevitable passage of a law attacking the three super-target men's clubs that do not admit women members. Mayor Koch was in the third year of his second term. He was disappointed by his narrow margin of victory in the 1981 Democratic party primary over a practical unknown. He would face a more formidable primary in 1985, knowing that one of his opponents would be Carol Bellamy, President of the City Council. Knowing that she would naturally attract support from women voters, Koch suffered pre-election jitters in 1984. And when Bellamy supported antidiscrimination legislation affecting clubs, Mayor Koch overcame his initial reluctance and supported such a bill. Despite the fact that only six members of the council were women, the bill ultimately passed by a thirty-five to one vote.

To win a majority in the council and provide a legal excuse for regulating membership standards in clubs that strongly asserted their private character, the drafters of the legislation had not only to use the state's statute banning discrimination in public places as their model, but also to modify it so that most of the private clubs

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that were not super-targets of the women's movement were safely excluded from the law's ambit, at least for the time being.

The state antidiscrimination bill includes a long list of the types of establishments that it describes as places of public accommodation. It then forbids any such establishment, including clubs that are not "distinctly private," to refuse to offer its customary services to any would-be patron on the grounds of race, religion, sex, or national origin. It does not define the conditions that make a club "distinctly private"; it leaves that to the courts, whose criterion has historically been the selectivity of clubs' membership policies. Since highly selective clubs as a general rule are deemed to be "distinctly private," the antidiscrimination statute would not seem to apply to them.

Because this is the case, the drafters of the city's bill were quick to see that if their bill applied only to establishments that were not selective in choosing their members, it would accomplish none of its main objectives. That naturally led them to find a formula that would both include as "not distinctly private" the very selective male establishments that the women's leadership wanted opened to women, while also excluding the wholly male clubs, mainly outside Manhattan, that were of no real interest to the women's leaders. The exclusion of these clubs forestalled their members' possible objections to the forced admission, which might have put pressure on the council members to vote against the bill.

As drafted, the law states that a club will not be considered distinctly private if it has four hundred members or more, serves meals regularly, and regularly receives payments for the "furtherance of trade or business." To the surprise of no one, all three super-target clubs had and have more than four hundred members, did and do serve meals, and rent out rooms to members and guests of members in which dinners are held, some of which would have to be described as being in "furtherance of trade or business."

To offer protection to the clubs that the council members did not wish to subject to the law, the council provided blanket exemptions for all corporations formed under the benevolent orders law, and for all religious organizations. Nevertheless, the burden of proving that it is "distinctly private" rests on the club that claims to be exempt from the provisions of Local Law 63. Thus, even if a club has fewer than four hundred members, it must prove that the meals it serves are not being used by the members as a business expense.

The law declares that testimony before the council did not

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describe clubs with fewer than four hundred members as being places where "business" is conducted. Similar paucity of testimony, the council wrote in the bill, caused it to reach the same conclusion with regard to benevolent orders and religious corporations. In short, it narrowed its main target to the clubs that the women's movement found offensive.

The emphasis on conduct of "business" is explained in the law's opening declaration. The council states that it is of great importance that persons of both sexes enjoy a fair chance at participating in the business life of New York City. It instances "certain membership organizations" as places where "business deals are often made and personal contacts valuable for business purposes . . . are formed," and describes their exclusively male membership custom as a "barrier" to the advancement of women. The council then notes that while some clubs are organized avowedly for purposes other than business (many, including the three super-targets, having rules against conducting business on the premises), the "prejudicial impact" on business activities "cannot be ignored."

Enforcement of the law is entrusted to the city's own Human Rights Commission. Under the terms of that agency's conciliation agreement with the Century, the club stipulated that if the law were not determined to be unconstitutional, it would process women's candidacies "according to procedures and standards identical to those applicable to men." No one, probably not even the members of the commission, knows exactly what these words mean, nor what action would be taken if a rejected applicant came to it with a complaint that an application for membership in the Century was turned down on the basis of sex. To what extent would the commission examine records of a club's admissions committee, subpoena committee members to explain why they voted on the applicant as they did, and read confidential and presumably unfavorable letters about a candidate sent to the committee by members? The commission would seem to have the right to do all this and perhaps more, and to be subject to criticism by a rejected applicant if it failed to do them upon her request. The council's disclaimer, that its "purpose is [not] to interfere in club activities or subject club operations to scrutiny beyond what is necessary" would seem to have little force alongside the responsibilities of the Commission on Human Rights. For what, in the end, are the operations of the clubs to which the council alludes? They do not run courses, hold get-togethers for people of kindred interests, business or otherwise, or act as clearing houses of employment and other opportunities. Besides serving meals, bal-

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ancing their books, and keeping their houses in order, their main operation is deciding whom to admit to membership.

Private clubs, public accommodation

None of this touches what may sometime become the most significant part of Local Law 63, the identification of "not distinctly private" clubs as places of public accommodation. The term "place of public accommodation" has no precise meaning. It is used by legislators to apply regulations to establishments that invite the public, whether overtly by advertising or by implication. In its innovative definition, Local Law 63 pays no attention to whether or not clubs accept women members; clubs that have four hundred members or more, and otherwise conform to the definition of "not distinctly private clubs" are now places of public accommodation, even if their membership is entirely female or mixed.

One cannot be sure what obligations may be imposed on places of public accommodation in the future. Theoretically, the clubs could be forced to open their meal service to everyone, to post meal prices at the door, to make sleeping rooms available for the homeless. None of these is included in the present law, but if the courts find that the New York City Council indeed has the power to utter a legalistic oxymoron by declaring an overly selective private club a place of public accommodation, all in the hope of removing barriers to female advancement in the business world, the natural restraint of future council members can hardly be relied on to keep the demands on clubs within reasonable limits.

Torn between two factions, one of which wishes to admit women members and thus, it hopes, to end controversy, while the other wishes to resist to the bitter end, the clubs have not been able to present their own case to the public. In the case of the Century Association, many members have long advocated admitting women, some to the point of resigning because the club would not concede. They would argue that it is simply improper not to admit women members. They do not answer questions that they consider mere details, such as what the status of members' wives would be if women are to be admitted? Believing, fundamentally, that the differences between the sexes are exaggerated, and should not be recognized, they do not care about the effect of such a membership change on the heart of the Century, its Long Table.

Members gather here at lunch, without introduction, though surely some are present more often than others, carrying on conversations unlikely to be found anywhere else. It is the truly distinctive

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mark of that club (each of the three super-targets having its own distinctive quality), and while none can say that women would spoil it, they would change it—and to what end? To demand recognition as equals? Who denies it? To be offered employment? To be invited in on the "deals" that some who have never set foot within the Century imagine its members engineer? To make the business "contacts" that will overturn barriers? With whom?

Another group that favors the admission of women argues that this is the only way to keep the club from having to change drastically. These members believe that the sooner the club makes a decision to comply with the law, the sooner the factions within the club will make their peace and find a *modus vivendi* with women members. After all, they contend, it's only for lunch. We have women at dinner, they say, and at all our functions except the monthly members' dinner now. And, they continue, if we have a few women at lunch (with whom some of us probably eat several times a year anyway), and change our members' dinner, then we can have peace with the women. None of them really believes all this nonsense about women helping their business career by sitting at the Long Table and listening to a discussion of George Washington's landholdings in what is now West Virginia, or the origins of bebop. Just let them in and everything will be the way it was—almost.

The shortcoming in that argument, according to other members, is that the women who will want to get into the club in response to Local Law 63 will be precisely the kind of people the club doesn't want. We will not be allowed to take the ones we'd like, these members argue, even if we could talk them into joining in the middle of the present fracas. Certainly the Human Rights Commission believes all women are equal, but the law's emphasis on business contacts is so heavy that the commission will find it hard not to charge discrimination when the admissions committee keeps out a candidate who frankly says she wants an equal chance with the men to make the deals they reputedly make. Even though this type of man wouldn't be acceptable, the Commission will be most suspicious of us for refusing this type of woman.

Then there are some members who believe that the crucial issue is the club's independence from governmental scrutiny, which they think can be sustained by abandoning the rental of function-rooms for any private dinner that even remotely smacks of business. That, some say, will increase the cost of maintaining the club and may embarrass some members, including some old and loyal members, but (others say) we can sell off some assets or ask for contributions

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from better-off members. Also, these members add, we will still have to establish that we don't talk business at lunch because we still have to prove that we're distinctly private; so we'll get every member to submit an affidavit of non-reimbursement and non-tax-deductibility, and another affidavit to the effect that he did not talk business at lunch. Then it will really be our club, which is what many of us have wanted; and our distinctly private quality will be preserved in reality, not just for the purposes of the law.

The response to this view is equally compelling. The kind of club you want this to become, say members of another faction, would not appeal to anyone except a Trappist monk. So many people would be biting their tongues at lunch that we'd need a resident oral surgeon to stitch them up. Besides, what is business after all? If a doctor member meets a patient member and asks him how he's feeling, is that business? What can a journalist talk about that isn't his business? Besides, the whole fuss about business here is only a canard, a pretext for getting women into a private men's club. They call us a place of public accommodation, but the only time we accommodate the public is when we rent a room out for someone's private dinner. If they asked us to apply antidiscrimination law to the use of such public accommodations, that would be perfectly reasonable, but they don't. Why not? Two reasons. Because they care only to get women into the club as members, and because those dinners are already open to everyone in the world, subject only to the host's invitation list, not our admissions committee. Insofar as we really are a place of public accommodation, we're in full compliance with the antidiscrimination statute. And so it goes.

The importance of being private

The club's problem in mapping a course of action is caused by the deep division between the picture of the institution implicit in the law, and the reality with which members are familiar. Members do discuss business in the club; if a writer eats lunch with his agent, they discuss his next work; two foundation executives may talk about projects for which they hope to find funding. The conversations are exactly as they would be in a public restaurant; only the surroundings are nicer. How would it benefit a woman writer to sit, in either place, at the next table and overhear their conversation?

Critics of men-only clubs paint a picture of them that is unrecognizable to their members. Critics insist that clubs are significant institutions, but members actually belong because the clubs lack significance; they are simply places that offer a few minutes of serenity

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in a turbulent city. The clubs do not control art, or the professions, and surely not the business or governmental life of New York City. It's impossible for the members to prove that they do not control the city's business and politics; the burden of proving that they do rests with their critics.

Members join for two reasons only: convenience and congeniality. Clubs pay normal taxes on everything, including the income, if any, earned from operations; they get no government assistance, no tax benefits. If members try to deduct club expenses in calculating their income tax, the clubs have no more knowledge of, or control over, their calculations than the *New York Times* has with respect to a reader who seeks to call his newspaper subscription a business cost.

Congeniality is provided by the buildings themselves, their ornaments, their staffs, but more importantly by conversation. Nothing spells out the reason or reasons why membership has been limited to men, but the rule probably reflects the fear that informal conversation between people who do not know each other well changes when both sexes are present.

When they are, the right of disparagement is impaired by traditional rules of courtesy. Such rules defy revolution, even the sexual revolution. It remains awkward for a member of one sex to disparage a member of the opposite sex whom he does not know well in the presence of strangers. Why is the disparagement important? Because, if brevity is the soul of wit, disparagement is its driving spirit. The common table at which members talk with their fellows, meet without premeditation, is at the heart of the club's achievement of congeniality. Neither the Century nor the Union League claims to achieve the wit that flows across the common luncheon table at, say, the Garrick Club in London, but New Yorkers will continue to try.

The super-target clubs select members not primarily in consideration of their achievements, as though membership were a reward or honor, but in expectation of congenial reflection of a candidate's personality, knowledge, and distinctiveness.

To claim that a club's refusal to admit women as members is of the same order as society's denial of equal citizenship and economic opportunity to minority groups is to trivialize the latter, not to magnify the former. For a bad law that seeks to accomplish a dubious social goal by fallacious reasoning and inadequately researched postulates of fact, there are but two remedies: either rejection of the law on constitutional grounds by the U.S. Supreme Court, or a

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change in public psychology. Although the first would be acceptable, the second is preferable.

Recognition of the social benefit derived from consciousness of the difference between the sexes may once again overcome the notion that all recognition of organic and cultural sex differences is invidious. Just as a society should not have all its institutions segregated by sex, so should it avoid laws that would have none of them so segregated. And if the time comes for desegregating the membership of one set of these, only one path can change a club's membership policy without changing its character: voluntary action by the members. What the city council undertook for political motives and extolled as a shortcut may be a dead end for private associations.

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Prison discipline and prison reform

JOHN J. DiIULIO, JR.

In 1954, a federal circuit court ruled that judges are "without power to direct prison administration or to interfere with ordinary prison rules and regulations." Today, however, judges exercise enormous influence over what prison administrators do and how they do it. Since 1970 the courts have intervened on a wide range of prison issues, including crowding, food services, sanitation, health care, due process protections for inmates, and the constitutionality of prison conditions. In 1986, some thirty corrections agencies were operating under court directives; many had class action suits in progress and population limits set by the courts; over a dozen states had court-appointed special masters, monitors, and compliance coordinators.

The rise of judicial intervention into prison systems has been part of a broader expansion of the courts' role in American government. In a few recent cases, the courts have shown some reluctance to intervene, and there is a hint of evidence that the spread of AIDS in prisons may encourage judges to defer more readily to the on-site wisdom of prison officials. But there is no reason to suppose that we are witnessing anything like a return to the hands-off doctrine; judges will continue to influence, and in many cases to dictate, how prisons are governed.

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While it is worth continuing the debate over the courts' authority to make correctional policies and to oversee their implementation, the practical question is not whether judges have the right to intervene but whether they have the ability to do so with predictable and desirable consequences. Do activist judges have the capacity to render decisions that make prisons more safe, civilized, clean, productive, and cost-effective, or are they doomed to issue orders that worsen rather than improve the quality of life behind bars? What, if any, lessons can activist judges learn from the almost two-decade-old embrace of courts and corrections that may enable them to intervene more wisely and with good (or at least neutral or nondisastrous) results in the future?

Three theories

At this point, there is no body of empirical research to tell us whether, on balance, judicial intervention has changed prisons for the better, altered correctional practices in a way designed merely to avoid unfavorable rulings, or led to undesirable or simply unanticipated results. Instead, there are at least three schools of speculation and a *prima facie* case against each of them.

One school argues that activist judges have emboldened the inmates, upset informal order-keeping arrangements among prisoners and between inmates and staff, and gutted basic custodial controls. Members of this school blame the courts for rising tides of prison violence. For example, in *The Public Interest* (Fall 1983) Kathleen Engel and Stanley Rothman argued that court-imposed reforms have increased prison violence by undermining the "complex relationships among inmates" that had "contributed to the maintenance of order and inmate solidarity." But the notion that such informal cellblock alliances were once a bedrock of prison order is a vivid but wholly unsubstantiated sociological myth; riots and disturbances have occurred most often precisely where prison administrators have relied upon inmates to control other inmates and have failed to run things "by the book." Especially in higher-custody prisons, those prison managers have governed best who have governed most and most formally.

A second school maintains that activist judges have done no more than force prison administrators to operate in ways that secure rather than deny prisoners' rights. Advocates of this view credit the courts with improving prison conditions. For example, the National Prison Project of the American Civil Liberties Union led the litigation efforts that expanded court intervention into penal affairs; indeed, the organization spearheaded the use of special masters and

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monitors. One of the ACLU's primary objectives in this area has been to decrease the number of people behind bars and to force a greater use of ostensibly less harsh and restrictive alternatives to incarceration; hence, whether the actual impact on cellblock conditions is good, bad, unknown, or nonexistent, the organization counts as "major victories" instances of judicial involvement where population limits have been imposed and negative media attention has been focused on the prison gates.

Yet a third school believes that the courts have fostered a codification of prison policies and procedures resulting in the bureaucratization of the prison, which in turn has made prisons more orderly and humane. This belief moves from a top-down conception of bureaucracy that focuses more on formal administrative trappings (bulky training manuals, elaborate central office policy directives, the existence of uniform institutional training programs, and the like) than on the real, day-to-day work of line employees. By definition, those in a bureaucracy who perform the agency's critical tasks have little discretion; successful job performance is not highly contingent on the integrity, personality, keen wit, or any other special talents of the workers.

Yet nothing can be more clear than that court-induced changes in how prisons operate have helped to increase the complexity of the corrections officers' work by vesting them with ever greater discretionary authority, personalizing their relationships with inmates, and obliterating the guards' once simple, paramilitary routine of numbering, counting, checking, locking, monitoring inmate movement, frisking convicts, searching cells, and so on. To the extent that prisons have undergone any sort of a court-induced organizational metamorphosis, the barbed-wire bureaucracies have become less, not more, bureaucratic, with effects on actual prison conditions that are hard to measure.

None of the leading theories fares well when considered in the light of actual cases. Perhaps the single most controversial, well-publicized, and revealing instance of judicial intervention into a major prison system is *Ruiz* v. *Estelle* in Texas. The case began in 1972, dragged on into 1987, and revolutionized the way that Texas ran its prisons. It provides much food for thought on the impact of judicial intervention on prisons.

The case of Texas prisons

In 1985, Dr. George Beto, for thirteen years a professor of criminal justice at an east Texas university, close to most of the prisons he had run from 1962 to 1972, sat in stunned silence as members of his

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graduate seminar who worked in Texas prisons lectured the class about their experiences. Beto's head drooped as they described in graphic detail how common it now was for Texas prisoners, especially new ones, to be raped or gang-raped; how every shakedown of cells turned up hundreds of weapons and other contraband; how certain inmate leaders ran prostitution and drug rings behind the walls; how prison gangs were putting out contracts on—that is, hiring inmates to kill—staff and other prisoners; how inmate classrooms and workplaces were, like the cellblocks, sites of inmate idleness punctuated by disorder; how demoralized officers, fearing inmate reprisals for disciplinary action and with little more than personal survival and a paycheck in view, were simply "keeping their backs to the wall" and ignoring most rule violations, major and minor.

During Beto's tenure and into the 1980s, the Texas prison system was hailed as one of the nation's best; but in 1984 and 1985 a total of fifty-two inmates of Texas prisons were murdered, and over 700 were stabbed. More serious violence occurred in those two years than had occurred in the previous decade. As the disorder mounted, inmate participation in treatment and educational programs became erratic, the once-immaculate inmate living quarters ceased to sparkle, and recreational privileges were curtailed.

What happened to the Texas Department of Corrections (TDC) was the product of at least two sets of related factors: a major flaw in the model of penal administration fathered by Beto and bequeathed to his successor, W. J. Estelle; and *Ruiz* v. *Estelle*, a landmark court case in which an activist federal district judge, William Wayne Justice, forced sudden, sweeping changes in TDC's philosophy, leadership, and day-to-day management practices while making the agency the *bête noire* of state policymakers and the press.

Beto instituted what came to be known in corrections circles as the "control model" of penal administration. Beto was a tall, lean Lutheran minister with a doctorate in education; his control model emphasized inmate obedience, work, and education, roughly in that order. Every TDC prison was run as a maximum-security operation organized along strict paramilitary lines. Official rules and regulations were enforced rigorously. In the prison corridors, for example, clean-shaven, white-uniformed inmates were required to walk between lines painted on the floors rather than moving at random down the center. Talking too loud was a punishable offense. Punishment for rule violations, major and minor, was swift and certain. Rewards for good behavior came in the form of better work

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assignments, sentence reductions, and trustyships. Each inmate spent his first six months doing backbreaking stoop labor, a cog in the machine of TDC's then enormously succesful agri-business complex. All inmates were required to attend school and learn how to read.

Beto earned the nickname "Walking George" for his practice of appearing unexpectedly at the prisons and roaming relentlessly to see that every phase of the operation met his exacting standards. He was a charismatic leader who made both his subordinates and the inmates feel that he knew or could trace their every move; in fact, he normally could. A man as comfortable in the aisles of the state legislature as he was in the cellblocks, Beto successfully courted governors, lawmakers, and others influential in state business, and saw to it that TDC got the legal authority and the money it needed to run its custodial and treatment programs in accordance with his correctional precepts.

The "building tender" system

Beto was perhaps the most well-read man ever to run a prison system; the influences on his thinking about how to govern prisons ranged from the Bible (which he read each morning in ancient Greek) and classic works of moral and political philosophy, to writings in public administration and texts by leading sociologists of the prison. It was in deference to the last of these that Beto fashioned as part of his control model the "building tender" system in which inmates were used to control other inmates.

From his reading of the sociological literature on prisons that included such powerful treatises as Gresham M. Sykes's *The Society of Captives* (1958), Beto came to the helm of TDC believing that if prisons were to be safe, clean, programmatic, and cost-effective, then it was imperative that some way be found to minimize or, better still, to neutralize the influence of convict leaders. Beto saw himself as a prison reformer out to habituate society's criminally wayward to the norms and values of a decent, law-abiding, and socially useful way of life. He was convinced by what Sykes had counseled—namely, that any attempt to reform the prison that "ignores the social system of the prison" (the language, leaders, laws, rites, and rituals of the convict population) was bound to be "as futile as the labors of Sisyphus."

Beto, however, was determined that TDC's way of coopting inmate leaders would not involve lax rule enforcement, illicit privileges, and the corruption of formal authority that characterized

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"con boss" systems. Rather than allow the most aggressive and violent inmates to rule, Beto tried to select certain inmate leaders, give them special official status beyond a mere trustyship, and use them to preempt the influence of more hard-core and incorrigibly anti-administration convict chieftains. "Either you pick their leaders," he explained, "or they do."

Beto's building tenders were to be rewarded officially with better food, job assignments, and other amenities in return for watching the officers' backs, providing information, turning cell doors, "tending" to the physical upkeep of the institution, and so on. In short, the building tender system was a calculated gamble aimed at turning the "natural" leaders of the society of captives into the official allies of the government of keepers.

Beto did everything imaginable to tilt the odds in the administration's favor. For one thing, he hand-picked his "super-trusties," choosing inmates who were tough but not predatory (or, in Beto's words, not the "kind who would rape a snake through a brick wall"). He permitted neither the building tenders nor the staff to "get too big for their britches." "Walking George" fired officers who violated their official trust, usually on the spot. Any building tender who grasped or demanded illicit privileges in return for his services was sent back into the fields to do stoop labor flanked by "fish" (new inmates). As Beto recalled, the Texas control model

> was, at heart, a system in which power was highly centralized. Power can be used well or ill, but unchecked it tends, as has been observed by better minds, to corrupt. It was therefore imperative that abuses, most especially abuses by staff members, be uncovered quickly and stopped.

When in 1972 Beto resigned amidst cries from all over the state that he remain as director of TDC, most parts of his control model were well institutionalized—the paramilitary procedures, the liberal awarding of good time, the stress on inmate discipline, work, and education. The building tender system, however, was never a well-integrated part of the model. Beto and his top aides were aware that, without unremitting efforts to keep it honest, the building tender system could easily degenerate into the very system of inmate dominance and corrupt inmate-staff relations that it was meant to forestall. As one high-ranking veteran of TDC noted perceptively:

> The tenders were always like a sort of sore thumb of the control model . . . . I mean here you had the bosses (officers) and the 'Yes sirs' and the steady discipline, all of it done formal-like and run by the authorities . . . . But then there were the tenders, inmates who were "first among equals" so long as they did our bidding. . . . But you know Dr. Beto, he'd never let it get out of control!

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Beto's extraordinary degree of personal involvement in keeping the building tender system from degenerating into a species of inmate self-rule was a symptom of its essentially prebureaucratic nature. The fact that he had to exploit fully his blanketing and charismatic leadership merely to keep the system on an even keel was a sign of its weakness. Virtually every other part of his control model could be mastered and implemented by any competent and dedicated team of prison officials—but not the building tender system.

The destruction of the control model

Whether they baptize their inmate allies building tenders, con bosses, or "inmate advisory council representatives," and whether the inmate-staff alliance is tacit or formal, it is never good policy for prison administrators to rely upon inmates to control other inmates. There are dozens of post-World War II sociological monographs on the prison asserting that such relationships are both inevitable and desirable as means of keeping order, rehabilitating inmates, and attuning the prison to "democratic values." Yet the factual record of this same period shows that all species of "participative prison management" have turned higher-custody cellblocks into versions of Hobbes's state of nature in which the inmates' most basic right—the right to safe incarceration—has been forfeited. Prison managers who have depended upon convicts or their leaders to maintain institutional control have consistently lost it, giving rise to situations in which the inmates, not the officers, dictate what happens behind bars. This could have been learned from the wave of prison riots that occurred in the early 1950s. But in deference to sociological theory, and in contradiction to his belief in prison governance by duly constituted authorities, Beto enlisted the support of building tenders, sowing the seeds of the control model's destruction.

Under Beto's hand-picked heir, W. J. "Jim" Estelle, the number of TDC inmates increased by the thousands and the agency's prisons more than doubled to over two dozen institutions. Though in many respects a brilliant prisons man, Estelle was no "Walking Jim." Under Beto, the building tender system was like an overly sharp knife wielded by a master chef in a calm kitchen. This knife was handed to Estelle who, by comparison, was a good short-order cook behind a busy counter. Estelle was a younger man with a mostly officebound style of executive leadership; word of abuses did not always trickle up to his headquarters in Huntsville, and there were no upward-flowing, independent channels of information such as had enabled Beto and his aides to check on the veracity of reports

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from the field and caused them to notice when no such reports were forthcoming.

Predictably, while most other parts of the control model survived and were strengthened under Estelle, the building tender system ran amok and became nothing more than a con-boss system in which selected inmates were allowed to carry weapons and were given illicit privileges for "keeping things quiet." In some instances, this meant administering beatings to fellow inmates who had defied an officer or refused to work. At a few TDC institutions, the administration became a virtual hostage to the building tenders, relying on them to perform many or most custodial functions. In at least one prison, the weekend staff consisted of only a dozen officers who supervised some forty building tenders who made counts, searched cells, frisked other inmates, and administered harsh and arbitrary discipline.

The corruption of the building tenders was infectious. Inmates abused by staff, or by building tenders at the behest of staff, were often unable to get a fair hearing (or any hearing at all) within TDC. In a complete perversion of the *esprit de corps* and sense of mission that had characterized the agency, wrongdoers at some prisons were shielded by their co-workers and, in some cases, by their superiors.

In 1978, the state's first Republican administration in 105 years took the reins in Austin and wasted little time in shaking things up. With new appointees, the Texas Board of Corrections, a body once dominated by leading Texas businessmen who had never been anything but supportive of TDC, started to cast unprecedented split votes and to voice public criticism of the agency. Political pillars of TDC such as Texas State House Appropriations Chairman Bill "The Duke of Paducah" Heatly and H. H. "Pete" Coffield were passing from the scene. Meanwhile, the state's oil revenues were drying up, forcing Texas policymakers to scratch for ways to be even stingier than was customary with financial support for public agencies. Estelle lacked the political instincts that had made Beto so successful with the state's political establishment; TDC lost its "sacred cow" status and was targeted for budget cuts.

Ruiz v. *Estelle*

It was in this context that the case of *Ruiz* v. *Estelle* was litigated. The case began in 1972 shortly before Estelle's appointment. Inmate David Ruiz, a chronic offender who had been incarcerated many times, sent a handwritten petition to Judge William Wayne

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Justice of the Eastern District Court. While in prison, Ruiz stabbed several of his fellow inmates and was often placed in solitary confinement. In his petition, Ruiz charged that conditions in "the hole" were inhumane. He claimed that he slit his wrists so that prison officials would release him from isolation. Ruiz challenged conditions of confinement in TDC under section 1983 of the U.S. Civil Rights Act. In 1974, Judge Justice combined Ruiz's petition with those of seven other TDC inmates, thereby framing a class action suit.

Unaffectionately called "Willie Wayne" by TDC officials, Judge Justice came to the *Ruiz* case with a record of strong judicial activism in education and other areas. He separated the damage claims at stake in the case from the injunctive issues, thereby making his control over the litigation absolute. In addition, he instituted a procedure whereby issues not raised by the inmate plaintiffs—crowding, recreational facilities, prison land-use, and many others—came under his review. He appointed a few of the country's leading prison litigation attorneys to represent the inmates and brought in the United States Department of Justice as an adversary to the State of Texas.

The trial began in 1978. In the four years preceding the trial, Judge Justice imposed a number of orders on TDC. In 1975, for instance, he ordered that prison authorities be prohibited from censoring inmates' mail. In 1980 the judge issued a 248-page memorandum opinion requiring scores of changes in the way that Texas ran its prisons, among them the following: an end to the use of building tenders; a requirement that the agency double its officer force and retrain veteran officers; a revision in the procedures for handling inmate grievances; a complete overhaul of the prisoner classification system that would reduce the number of maximum-security designations; a division of the prison population into management units of not more than 500 each; a radical improvement in health delivery systems that would give inmates easy access to state-of-the-art medical treatment; and the provision of a single cell for each inmate. All of the major issues in the case were decided wholly in favor of the plaintiffs. The judge dismissed without formal comment TDC's contention that certain of his requirements were likely to spawn inmate violence; and he rejected summarily the agency's plea that the timetables he had established for implementing these changes were unrealistic.

During the nine-year legal battle leading up to Judge Justice's 1980 ruling, TDC's control model had received mixed reviews. Some experts credited Texas corrections officials with running the

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only safe, clean, cost-effective prison system in the country. Others denounced TDC as a repressive agency that treated its inmates like slaves. The judge readily agreed with the system's critics, holding that TDC imposed cruel and unusual punishment on inmates as a result of the "totality of conditions" inside its prisons.

In 1982, a decade after the litigation began, the U.S. Circuit Court of Appeals for the Fifth District upheld Justice's central finding about the unconstitutionality of conditions inside Texas prisons, but overturned several provisions of the original order. "Taken as a whole," the three-judge panel wrote, "the district court's decree administers a massive dose when it is not yet demonstrable that a lesser therapeutic measure would not suffice." Among other things, the panel reversed Justice's one man, one cell holding, noted that the "Constitution does not require that inmates be given the kind of medical attention that judges wish to have for themselves," and vacated orders that TDC get Justice's approval for any construction plans and that the reports of the special master appointed by Justice be treated as findings of fact.

At the same time, however, the panel chided TDC officials for failing to run better prisons and warned that the "implementation of the district court's decree can become a ceaseless guerrilla war, with endless hearings, opinions and appeals, and incalculable costs." The panel also warned Judge Justice and his team of monitors to "respect the right of the state to administer its own affairs so long as it does not violate the Constitution."

Unfortunately, neither the judge and his monitors nor the TDC officials fully heeded the panel's warnings. The litigation continued to boil for three more years amidst bitter charges and countercharges. Estelle was the proud director of a proud agency. He challenged TDC's critics on the bench and elsewhere to measure its performance in terms of safety, cleanliness, programs, and costs. Compared to prisons in California, Michigan, and many other major jurisdictions, TDC prisons had been quite good. For example, between 1973 and 1980 Texas had a total of nineteen prison homicides while California had 139; rates of prison assaults in Texas prisons ran well below the national average while costs per inmate were the lowest in the country; TDC boasted the only fully-accredited prison educational system in the nation; and so on.

Effective prison management

TDC's relative success was due mainly to its tight, formal system of managing prisoners. While other prison systems experimented

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wildly with "participative management" schemes designed to "demilitarize" the institutions, TDC's internal management remained security-driven and autocratic. While other corrections departments rushed to create loosely structured "treatment milieus" in the name of rehabilitation and inmate "self-development," TDC required inmates to work, go to school, speak respectfully to authorities, dress neatly, wash regularly, and obey the rules. While maximum-security prisons in other states became places where predatory felons were free to walk, talk, and behave pretty much as they did on the streets, TDC subjected inmates to a rigorous daily routine of numbering, searching, locking, and frisking. Whereas other prison agencies gave inmates "good time" (i.e., sentence reductions) automatically, TDC employed a "point-incentive system," under which well-behaved inmates received two days off for every productive, infraction-free day they served (the country's most generous good time program) while poorly behaved inmates did "flat time" and lost visiting and other privileges. Finally, whereas in most other prison systems directors changed every few years, wardens played musical chairs, and line employees were unionized, TDC enjoyed remarkable administrative stability at all levels, developed a clear sense of organizational mission, and had serene labor-management relations.

These and other elements of TDC's management regime were worth preserving. In 1982, with Estelle still in the director's chair and with a live possibility of measured, effective organizational changes that could provide most of the remedies mandated by the court, a blue-ribbon panel noted that TDC had been described as "the best example of slavery remaining in the country" and "probably the best prison system in the world"; as the panel's report concluded, the reality "lay somewhere in between."

The judge, however, painted an image of TDC that was unrelievedly bleak, while his staff acted in ways that were almost calculated to breed ill will, confusion, and low morale among the very persons—from the director to the junior officers in the cellblocks—who would ultimately have to translate the court's decree into administrative action. No matter how Estelle and his staff moved to bring the agency into compliance with the court's sweeping orders, public criticism and a barrage of new orders followed. Echoing the complaints of cellblock workers, a central office administrator observed:

> Compliance of staff to our orders or of inmates to staff orders was never really a major problem here. . . . But now, with the court action and the

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> rest, every day has become a goal line defense. . . . Officers must look at the bulletin board each day to see if the essence of the job they had the other day has changed. . . . How would you like to be given a new syllabus every day to teach from? One day you emphasize one theme, the next day another. Pretty soon everyone is confused; people get disgusted, some quit, and things just break down.

Estelle's defense of the agency, like the judge's attack, was undiscriminating, even desperate. He fought fiercely to protect Beto's control model and to shore up staff morale. By 1983, however, Beto himself recognized that the building tender system was a cancer ripe for the cutting, a rotten administrative crutch that TDC could and should throw away at the judge's invitation in order to preserve and strengthen the rest of the system. This, however, was not Beto's fight. At Estelle's insistence, TDC maintained in its legal defense that the building tender system—documented in agency pamphlets, experienced by thousands of inmates and staff, and known even outside of Texas as one feature of Beto's control model—did not exist. Under fire from the Board of Corrections, and having had the agency's budgetary requests rebuffed by a state legislature that was about to launch critical investigations into TDC's financial management, Estelle resigned in late 1983. Later he explained:

> I was determined, as all of us were, to fight for our ideas about how to run prisons. We had self-proclaimed prison reformers telling us how horrible we were at doing our jobs. Of course, what these people knew about prisons you could fit into a tiny thimble with room to spare. They wanted to effect changes and baptize every change a reform. Well, every change in a prison setting is not a reform and correctional institutions are ill-equipped to handle sudden administrative changes. . . . We were wrong on some things, short as hell in some areas of the operation. We were willing to usher in reasonable changes and remedies. But we had been doing most things very well and would not be part of simple-minded so-called reforms that, as sure as I'm sitting here, were bound to kill inmates, injure staff, and destroy our programs.

The principled intransigence of the fallen director was mirrored, albeit crudely, by his staff. The thrust of the court's decree was caricatured by many of the uniformed officers. In a typical remark, one veteran officer stated: "The judge says an inmate can spit in your face. I won't have it. That's no good for the inmate! What does that teach him but to misbehave the way he's always done?" A warden asserted: "We don't need people coming in here —judges, monitors, politicians, professors—telling us what to do. We have our lives invested in these prisons. Our inmates are kept well. They're not getting raped right and left. . . . But I guess that's what the judge and them others want."

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"Cleaning up the mess"?

Following a brief stint by an acting director, in mid-1984 Estelle was replaced by Raymond Procunier. Known in corrections circles as "The Pro," Procunier had directed several prison systems, including California's. A salty-mouthed man with a brash style who approached inmates and staff on the prison yard like an old-time ward politician seeking votes, Procunier announced that he would "clean up the mess" in Texas within two years and fully implement the court's orders.

Initially, Procunier had a honeymoon with state policymakers and the press, and won the trust and support of TDC's "old guard." But rather than focusing on the nitty-gritty business of running decent prisons with a demoralized and beleaguered staff, Procunier sponsored empty but progressive-looking measures (such as a complete redrafting of the agency's prisoner classification system) and rushed TDC into the latter stages of compliance with Judge Justice's decree. He fired employees who did not jump to cooperate, subjected the officers to lie-detector tests, and took other actions that undercut his popularity within the department. Meanwhile, political support for his administration crumbled as murders multiplied, inmate-on-officer assaults skyrocketed, programs were disrupted, costs escalated, prison gangs organized along racial and ethnic lines blossomed, and outside contractors were brought in to do the agricultural and other work once solely the province of TDC inmates.

In the wake of the political and judicial tumult, Texas officers relaxed the unyielding attention to basic security procedures that had once been a hallmark of TDC management. Out of a mix of spite, wounded pride, and simple confusion about the state of their authority, officers in some prisons started letting inmates congregate freely out in the yards and inside the cellblocks. The formal chain of command and standard operating procedures governing cell searches, contraband interception, and the like were weakened and in some places abandoned. In a typical remark, one veteran TDC officer confided sadly:

> Nobody felt like keeping it up. All you heard was that we beat the inmates, we didn't care for the inmates, that we let them rip up each other. . . . Then the outsiders are giving us orders. . . . So we let go, let everything go.

As more TDC inmates were being buried, rates of staff turnover reached all-time highs, and officers took the unprecedented step of unionizing, Judge Justice, who had not once set foot inside of a TDC prison since the *Ruiz* case began, continued to pressure the agency. The court's actions came as repeated stabs against the officers' sense

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of mission and encouraged TDC workers at all levels to abdicate responsibility for the inmates, enervating any desire they might have had to go above and beyond the call of duty at a time when enormous demands were being made on them. Judge Justice and his staff made it clear that they were out to revolutionize TDC, not reform it. As one of the court's aides later confided, they acted on the assumption that TDC was "rotten from top to bottom, that everything had to change"; they denied that TDC's paramilitary system of formal governance, as opposed to its use of building tenders and later con bosses, was mainly responsible for the historical lack of disorder inside Texas prisons.

The court joined the agency's new director in explaining the rampaging institutional violence not as the result of a breakdown in the formal aspects of the control model, but as the product of a "power vacuum" created by the abolition of the building tender system and filled by a new, more vicious, less controllable cadre of inmate chieftains who headed TDC's budding, California-style prison gangs. In a twist of historic irony, both the critics of the agency and its supporters (including, to the surprise of many, the generally liberal *Texas Monthly* magazine) joined in repeating Beto's initial mistake of assuming that prison administrators cannot govern without somehow harnessing the support of the "society of captives" and its leaders. The violence, it was claimed, occurred because pro-administration building tenders were "inevitably" replaced by anti-administration prison gang leaders.

In California and other places where prison gangs had become dominant, prison officials had entered into quasi-formal power-sharing arrangements with the inmates, brokering truces among the prisoners and between inmates and staff via "men's advisory councils." Even with former California director Procunier in charge, however, TDC's tradition of control by duly constituted authorities remained too strong to permit that folly from being reenacted in Texas. Instead, after hiring a couple of sociologists to analyze the situation, Judge Justice and his aides concluded that more officers should be hired, and quickly.

Assuming that hiring more officers will necessarily improve the administration of a prison is like assuming that hiring more violinists is bound to improve the sound of an orchestra. The new TDC "violinists" were hurried into the cellblocks, many without even the most basic preservice training. Their in-service training amounted to a socialization in the false but self-fulfilling prophecy that, minus the building tenders, nothing could be done to gain (or regain) con-

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trol. There was a rapidly shrinking minority of veteran TDC officers and higher-ranking officials who knew better, but by 1985 only a very few of them cared to fight for and demonstrate the efficacy of the rest of the control model. Instead, in the face of the court's order, and under new and less popular leadership, those TDC administrators who had allowed the building tenders to run wild surrendered their inmate allies and gave up their formal means of control as well. In a comment typical of TDC veterans who lived through the turmoil, one ranking agency official observed:

> We throwed the baby out with the dirty bathwater. We had a good program that didn't have nothing to do with the building tenders. Hell, I worked places in this system where we always made it run by the book, like a military operation. That's the way it was under Dr. Beto and mostly under Mr. Estelle.

In 1985, Procunier resigned under pressure and was replaced by his second-in-command, O. L. "Lane" McCotter, a former commandant of the military barracks at Fort Leavenworth, Kansas. Prodded gently by Beto, who had influenced then-Governor Mark White to appoint the former army colonel as head of TDC, McCotter and his chief aides started to pay attention to what was actually happening in the field. Moved by a vision of a return to the control model minus the building tenders, McCotter held staff meetings, circulated encouraging intradepartmental memos, and launched critical but sympathetic on-site inspections to ensure that officers were doing their jobs and enforcing the rules. TDC began to make more extensive use of metal detectors, impose tighter restrictions on inmate movement, legally curtail the free flow of prison mail, and see to it that inmate grievances were handled formally.

An elite team of officers (specially outfitted with black fatigues and combat gear), trained to handle unruly inmates with a minimal use of force, was strengthened and became a fresh source of pride. Turnover rates dropped, and officers began competing in earnest for tough special assignments and departmental awards. Inside the prisons, signs were hung that read: "Through These Gates Enter the Finest Correctional Officers." In a gesture that was both symbolic and substantive, several wardens saw to it that the green lines that ran down the sides of the prison hallways, within which inmates were required to march, received a fresh coat of paint.

During the last three months of 1985, having begun what one TDC official welcomed as "a return to a few of the basics," the system experienced no murders and fewer stabbings than had occurred in any three-month period since Estelle's last days. In the first nine

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months of 1986, the prison homicide rate shriveled as only two of the nearly forty thousand inmates were killed. Rates of assault and other measures of disorder declined by as much as 50 percent, even at the system's worst institutions. The agency's fields, factories, and classrooms started to hum, while inmates enjoyed better access to athletic equipment, good food, and most other amenities than they had over the last two years.

In 1987, under pressure from resurgent Republican Governor William Clements, McCotter left TDC to assume the reins of another state system. Most observers gave his successor an even chance of presiding over prisons where conditions were more decent than wretched.

The activist judge: savior or villain?

In the early months of 1987 Judge Justice was threatening to hold TDC in contempt and fine it tens of thousands of dollars if its inmate population rose above the arbitrary quota that he had set. As had been true of his behavior in the early days of the *Ruiz* litigation, "Willie Wayne" ignored reasonable arguments concerning the validity of his assumptions about the causes and consequences of prison crowding and remained deaf to other assaults on his expertise as TDC's *de facto* director of corrections. Meanwhile, since 1972 Texas taxpayers had spent over a billion dollars to implement the judge's muddled vision of how to govern prisons, millions of it having gone to inmates' attorneys and the court's special masters and monitors.

A few years earlier, however, while the dead inmate bodies were piling up in TDC, Judge Justice spoke before a large audience consisting mainly of corrections practitioners. Ironically, he was introduced to the group by none other than Dr. George Beto, who in a courteous and conciliatory spirit praised the judge's concern for corrections. Justice returned the personal compliments, noted that "the courtroom is a less than ideal setting for the development of correctional policy," and mentioned a "growing awareness of the centrality of the role of corrections administrators in the process of maintaining prisons that are safe, lawful, and humane."

In Texas, the activist judge was neither a savior nor a villain. Instead, he was a force for sweeping changes, some of them good, lots of them bad, many of them wholly unanticipated, and others yet to unfold. Technically, there was absolutely nothing about the court's ruling, least of all in Judge Justice's order to abolish the corruptive building tender system, that made good prison govern-

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ment in Texas impossible; the worthwhile parts of the control model, including the paramilitary system of formal prison governance, were not ruled completely out of existence. While parts of the court's order (e.g., the provision of numerous amenities for inmates in solitary confinement) wrested important carrots and sticks from the hands of Texas keepers, nothing in the letter of the court's decree gutted TDC's basic custodial controls or made tight, security-conscious institutional management illegal.

It was not so much the letter as the spirit of the judge's attack on the agency that courted the tragedy of 1984 and 1985. Though by no means perfect, compared to many other agencies TDC had a remarkably good record, because it had stable executive leadership, conscientious managers, and dedicated workers who assumed strict responsibility for the care and custody of adjudicated felons and organized themselves accordingly. Infusing the members of any large, complex organization with a genuine sense of mission and identification with their agency is no easy task. Corrections is a dangerous, dirty, difficult, and thankless profession, but through two decades of careful nourishing, first by Beto and then by Estelle, TDC staff at all levels had come to share a deep belief in the worth and rightness of their work. Unlike most state corrections departments, TDC's prison workers were proud of their agency and attached to a disciplined, no-nonsense way of getting the job done.

What Beto and Estelle had taken twenty years to build, Judge Justice, aided and abetted by Estelle's successor and by grandstanding state policymakers eager to make fresh political hay and headlines out of the system's legal troubles, helped to put asunder, by making the task of formal prison governance inside Texas prisons much harder and personally more unrewarding. TDC employees were sensitive to how the agency's detractors on the bench and elsewhere had portrayed them as nothing but a "bunch of redneck guards and contraband carriers." As one veteran TDC employee recalled:

> The judge and the politicians and the newspapers was all over us like stink on a skunk. No sooner did we fix one thing, broken or not, than we was told to fix another, and another. . . . We didn't think so much was wrong to begin with, so it just got crazier and crazier. . . . I worked here the better part of my adult life, and, honest to you, I never seen nor heard the half of what they was accusing. . . . If I'd a believed TDC was all they said, I'd a been after it too.

To this day, there are those who insist that Judge Justice imposed a "straitjacket" on TDC and blame him for the horrors of 1984 and 1985; but it is nearer to the truth to say that he forced the agency

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into wearing an ill-fitting garment that eventually, and predictably, burst at the seams. In 1984 and 1985, TDC personnel could have kept a close watch on tools in the industrial plant, frisked inmates regularly, segregated inmate predators, identified and brought special charges against prison gang organizers, limited the flow of inmates in and out of the cellblocks and around the dining halls, rewarded inmates for good behavior, and taken the scores of other basic and once reflexive measures that would have prevented or reduced the level of individual and group misconduct behind bars. Instead, the judge fostered a situation in which formal controls were relaxed, infractions were ignored, and the inmates were increasingly left to their own murderous devices. As it complied with his decree, TDC stopped governing prisons, doing less than it had at any time since before the Beto era to protect and guide those in its custody.

The court's intervention resulted in the imposition of hitherto unknown legal, political, and budgetary constraints on the agency. If the judge had been more judicious, his understanding of prisons sounder, his appreciation for what TDC had achieved in the past less miserly, and his preoccupation with its failings less total, or if he and his aides had troubled themselves to consider the possible unintended effects of their actions on both inmates and staff, there can be little doubt that things would not have degenerated as they did.

Before the judge issued his orders, TDC's *ancien régime* was rotting from within as building tenders became con bosses. Instead of helping to preserve those elements of the existing administration that were worth preserving, the court excused itself as TDC went from a mostly benevolent paternalistic despotism run by prison officials, to a malevolent anarchy of competing prison gangs and their leaders. By gradually returning to something like the control model without building tenders (and given the judge's prudence and forbearance), TDC may yet substantially improve the quality of life inside its prisons.

Responsible judicial intervention

If prisons are to become more safe, clean, and productive, then correctional workers, legislators, journalists, researchers, activists, and others must work together to make them so; judges alone can neither pave the path to better prisons nor be held responsible for wretched conditions behind bars. Judges, however, are in a uniquely powerful position to improve or worsen prison conditions.

Today, few persons inside or outside of corrections dispute the right of the courts to intervene. No matter what their crime, under

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constitutional law prisoners are not "slaves of the state"; they are incarcerated citizens of this republic. Where those immediately responsible for providing prisoners with decent living conditions fail to do so, the courts must compel them to do their duty. Based on an examination of the *Ruiz* case and dozens of other instances of judicial intervention into penal affairs, there are a few moral and practical lessons that may help to improve judicial capacity in this area.

As judges attempt to make changes in the way that prisons are governed, they should visit the institutions, make first-hand observations, and talk to inmates and staff. The ethic of a bench that confined itself to interpreting the laws is hardly appropriate for judges who make and oversee the implementation of laws; responsible activist judges must leave the serenity of their chambers. Judges will learn more from such field trips than they will from reading all of the books, essays, and neatly-typed depositions in the world. They will be in a far better position to predict and weigh the real costs and benefits of any court-induced changes and to appreciate the constraints under which prison administrators at all levels operate. They will be able to see for themselves whether institutional practices are in need of repair, and to judge whether cells are cramped, food is decent, health care is available, and so on. In the bargain, they will become less captive to aides and attorneys who by inexperience, self-interest, or ideological predisposition are less than fit to be the "eyes, ears, and arms" of the court. Finally, they will come to know the prison staff and be in a position to guide them should major reforms prove necessary.

Judges should understand that administrative stability at the top of a corrections department is hard to achieve and precious. Between 1973 and mid-1987, in less than one-third of all corrections agencies did corrections commissioners enjoy an average tenure of five years or more; in over one-third they held office for an average of three years or less. Judges should try not to exacerbate this problem of fluctuating executive leadership, for it is largely responsible for the fact that prisons have been ill-managed, under-managed, or not managed at all. And they should recognize how incredibly difficult is the task of the line corrections officer even when performed under the most stable and supportive conditions; we would all be better off if most judges (and college professors) had the practical wisdom, public spiritedness, and professional integrity of the average prison worker.

Finally, in passing on the constitutionality of prison conditions, judges have done much to expand the scope of prisoners' rights but little to effect commensurate increases in the legal power of prison

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officials. Judges should redefine their role in corrections by fostering a broader application of the idea that prisons must be governed in ways that make them "constitutional." In the Madisonian formulation of *Federalist* 51, constitutional government springs from the recognition that "men are not angels"; those who rule must be strong enough to control the governed, but obliged to control themselves. Prison managers are the government of the prison. They must be given enough formal authority to govern men who are most decidedly not angels. At the same time, however, they must be subject to internal and external "checks and balances"—professional standards, peer review, legislative inquiries, media scrutiny, openness to extradepartmental researchers, and, last but not least, responsible judicial intervention and oversight.

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Why "defunding the Left" failed

MICHAEL S. GREVE

WHEN THE Reagan Administration took office in 1981, one of the priorities urged upon it was to cut federal funding for liberal and leftist advocacy groups. Well-known conservative activists openly advocated a strategy of "defunding the Left." This was necessary, they argued, for the success of the conservative social and deregulatory agenda. The incoming administration shared this assessment. President Reagan himself made no bones about his hostility to public interest litigators, to whom he once referred as "a bunch of ideological ambulance chasers doing their own thing at the expense of the poor who actually need help"; he also sensed that the liberal public interest movement was a primary obstacle to his campaign promises of "regulatory relief" and of advancing a conservative social agenda.

Advocates of "defunding the Left" rightly believed that federal funding for liberal groups was substantial. For the past decade or so, the government has supplied roughly *one-third* of the public interest movement's income (not counting the effects of favorable tax treatment, which are discussed below). Conservatives and libertarians opposed this support on the grounds of government integrity. The authors of the most elaborate study of governmental funding of advocacy groups, for example, quote Thomas Jefferson's statement that "To compel a man to furnish contributions of money for the

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propagation of opinions which he disbelieves is sinful and tyrannical," and go on to document at length that "there is a great deal of sin and more than a little tyranny in the United States today."[1] But more was at stake than an empty principle. Liberal advocacy groups have a significant impact upon public policies and, perhaps more importantly, upon the ideological and political climate in which policies are made.

The advocates of defunding probably overestimated the extent to which governmental support helps advocacy groups to maintain their momentum and existence. Even a total defunding of public interest firms by government would not mean the end of ideological activism. Large public interest firms would survive defunding, and liberal foundations would make up for part of the loss in tax dollars. An all-out assault on public funding would also likely lead to a rise in individual contributions to advocacy groups. Still, a wholesale cancellation of governmental subsidies would result in a very severe shakeout in the public interest movement. Many small firms would have to close; larger ones would have to scale down their activities.

Early promise

In 1981, a strategy of defunding the Left seemed to stand a good chance of success. Liberal groups took the threat of defunding very seriously, and conservative activists considered it a likely prospect. The movement's egalitarian, anti-capitalist ideology appeared to have been discredited with the defeat of the Carter Administration. It was plausible to assume that Congress would not be eager to rush to the assistance of a movement whose causes had proven highly unpopular with the electorate. Economic growth was no longer a suspect idea; confidence in political institutions was rising, as it continued to do until very recently. And in an era of general anti-"Big Government" sentiment, defunding the Left could be—and was—presented as a well-founded attempt to cut the budget. Understandably, then, the administration was optimistic about its chances to defund the Left. It was also very determined. Conservative activists committed to defunding were appointed to the Board of the Legal Services Corporation, to the Office of Management and Budget (OMB), to the Justice Department, and to various grant-making and regulatory agencies.

Surprisingly, though, the Reagan Administration has been unable to translate its strategy of defunding the Left into political practice.

[1] James T. Bennett and Thomas J. DiLorenzo, *Destroying Democracy* (Washington, D.C.: Cato, 1985), p.1.

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Public interest advocates have in large part been responsible for embarrassing setbacks to the Reagan agenda. Deregulation in the consumer, health, and environmental areas has never come about, and two top Reagan appointees responsible for policies in this field (Anne Gorsuch and James Watt) were driven from office. The Administration is widely perceived as insensitive to minorities and the poor, and what modest civil rights policies it pursued were stopped in their tracks. Government-funded advocacy groups were instrumental in these and other failures of the Administration. Not a single one of the Administration's proposals for defunding its sworn enemies has been fully implemented. To the contrary: Federal funding for public interest groups appears to have increased substantially.[2]

It is extremely difficult to assess the true extent of federal funding. No one has any idea of how much money is involved and exactly where it goes. Even the number of federal grant programs for nonprofit organizations, including advocacy groups, is unknown. (One researcher counted 496 such programs, and added that this accounting was probably incomplete.) Instead of hard, fast, and probably embarrassing figures, then, all we have is anecdotal evidence and rough estimates. Anecdotes can be dismissed, estimates disputed. However, the available evidence indicates rather clearly that federal funding for advocacy groups amounts to hundreds of millions of dollars per year, and very likely exceeds one billion dollars. In the following sections I discuss four different aspects of the system through which advocacy groups receive subsidies or support from the federal government: tax exemptions, discretionary grants, the Legal Services Corporation, and attorneys' and intervenor fees.

Sources of support

Roughly one-third of the public interest movement's total budget consists of membership contributions. Not all public interest groups are membership organizations; in fact, one-third of all public interest groups have no members, and among think tanks and litigation firms, non-membership organizations predominate. But virtually all groups that do have members, and some of those that do not, raise funds through computerized mailing lists. Direct mail solicitation has been an important factor in the success and perseverance of public interest groups, lobbyists and litigators alike.

[2] For a detailed account of one sector of the public interest movement, see Michael S. Greve and James Keller, "Funding the Left: The Sources of Financial Support for 'Public Interest' Law Firms" (Washington Legal Foundation, Working Paper No. 9, Jan. 1987). Much of the quantitative, empirical evidence in the present article is based on this paper.

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The profitability of this fundraising device depends almost entirely upon special legal preferences. Virtually all public interest groups are "charitable" organizations under section 501(c)(3) of the tax code, which confers two important benefits: First, charitable organizations receive favorable bulk postage rates, without which computerized mailing lists would not be profitable; and second, contributions to such organizations are tax-deductible under section 170(c)(2) of the IRS code. Economists have estimated that at least one-third of all contributions to public interest firms are contingent upon deductability.

It is not altogether obvious why public interest law and advocacy firms should be regarded as "charitable" organizations. There are considerable differences between genuine charities which provide uncontroversial, socially desirable services, and non-profit organizations which litigate, lobby Congress, and engage in advocacy of political causes (some of which are highly controversial). It is thus not surprising that the question whether litigation and lobbying were "charitable" activities was a matter of intense controversy when the public interest movement got under way. In 1969, the IRS ruled that litigation groups were not charitable under section 501(c)(3). However, this decision caused a furor in Congress and in the media. Not even the Nixon White House supported the IRS, and the agency had to reverse its ruling.

Nonprofit groups gained another victory when Congress amended the tax code in 1976, adding a rule (the "Conable amendment," named after its sponsor, Republican Barber Conable) that allowed charitable organizations to spend 20 percent of their budgets on lobbying activities. In practice, this is not the upper limit. There are plenty of loopholes that can be—and have been—exploited; for example, a simple disclaimer ("This newsletter is not intended to influence legislation pending in Congress") generally suffices to transform lobbying efforts into an "educational" activity.

One may want to quibble about whether tax exemptions constitute a "subsidy" to public interest groups. Exemptions are not disposable income for advocacy organizations, and do not show up on their books. On the other hand, it is quite clear (as Mary Douglas and Aaron Wildavsky illustrate in their study, *Risk and Culture*) that without the legal preferences conferred by section 501(c)(3), the existence of many—though not all—public interest groups would be in doubt.

All other governmental contributions to advocacy groups are more open and direct than tax exemptions, and constitute "subsi-

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dies" in the ordinary sense of that word. To begin with, many governmental agencies possess statutory authority to give out discretionary, direct grants to advocacy groups. Such grants are made for a wide variety of purposes, including lobbying. During the Carter Administration, for example, the EPA awarded grants to environmental firms to lobby the states in support of transportation controls, including parking bans and gasoline rationing, in metropolitan areas. The EPA did not want to push directly for such highly controversial plans because it feared a backlash against the entire clean air program, and thus tried to build outside support.

Direct subsidies also include grants for various research and "educational" programs. Such donations allow public interest groups to pursue activities they could not otherwise undertake. Some of this work brings considerable publicity, and it generates part of the "expert knowledge" that the groups feed back into the regulatory process. Probably the best-known example of such projects is the *Global 2000 Report to the President*, a 1980 government-funded study that predicted an ecological catastrophe, severe resource depletion, and a population crisis of dramatic proportions for the year 2000. Environmental organizations contributed substantially to this report.

Some of the most generous governmental funding programs for advocacy groups serve the purpose of supporting litigation and related activities. The public interest movement frequently seeks judicial remedies for political grievances, and it pursues a conscious strategy of transforming political disputes into legal ones. Frequently, the movement uses the legislatures for this purpose. In the case of the Education for All Handicapped Children Act of 1975, for example, activist groups persuaded Congress to write the statute in such a way that it would be open to extremely expansive judicial interpretation.

The single largest federal program in support of public interest litigation is the Legal Services Corporation. The LSC was established in the waning days of the Nixon Administration for the ostensible purpose of increasing legal representation and access to courts for the poor. However, the agency does not transfer money directly to individuals; it makes grants to legal aid firms who then select and represent plaintiffs. While most grantees are involved primarily in fairly tedious divorce cases, landlord-tenant disputes, and the like, many others pursue an explicit ideological agenda, and litigate for the purpose of legal and social reform. They have had a large measure of success: LSC-funded litigation has greatly influenced the

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structure and scope of federal entitlement programs. Lawsuits instigated by poverty lawyers led to a wholesale transformation of the AFDC program, by relaxing state-imposed eligibility criteria and by abolishing residency and work requirements.

LSC grantees constitute a large segment of public interest advocacy in terms of case load and fiscal expenditures. The LSC's 1980 budget was $321 million. Since then, some small cuts have been made, but the Congress has largely succeeded in protecting the LSC and its budget against the Reagan Administration's persistent attempts to abolish the agency. In the current fiscal year, the LSC still expects to spend more than $290 million. In 1985, state and local governments contributed another $20 million to LSC grantees. Furthermore, the firms are allowed to collect attorneys' fees—for litigation that is publicly funded anyway. While no precise figures are available, reasonable calculations of governmental subsidies to LSC grantees come out to more than $350 million annually.

Suing for profit

Attorneys' fees provide another major source of public funding for public interest law firms. Fee awards and reimbursements are probably the most ingenious idea for funding public interest advocacy: Since many groups are in the business of suing the government, routine fee awards would make litigation a self-sustaining enterprise. Generally, litigation in the United States operates under the American rule, which holds that the parties to a lawsuit have to pay for their own legal expenses, no matter who wins or loses. There were always a few exceptions to this rule, but none of them allowed routine fee reimbursements for public interest litigants. The groups realized this, and began to push for legal reforms that would permit them to collect fees, at least for successful litigation.

There is nothing wrong in principle with an arrangement under which the losing party pays for its own and its opponent's legal expenses. Britain and Canada, among other countries, operate under this "English" rule, which is widely believed to have the benefit of discouraging risky or frivolous litigation, thus introducing an element of stability into the legal system. However, public interest groups wanted neither the English nor the American rule. They wanted the best of both worlds, to be reimbursed for their own sucessful lawsuits, *without* having to reimburse their opponents for the unsuccessful ones.

In the late 1960s, they got what they wanted. The courts fashioned a new exception to the American rule, which came to be known as

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the "private attorney general" doctrine. On the theory that public interest groups were unselfishly enforcing important constitutional and political objectives against recalcitrant bureaucracies and state governments, the courts decided to reimburse them for their law enforcement efforts—without, however, requiring the groups to pay opponents' expenses for unsuccessful litigation.

There were a few statutes at the time that, if extremely liberally construed, could be read to authorize fee awards, and the courts seized upon these provisions. A little later, however, they took to reimbursing "private attorneys general" without any congressional authorization whatsoever. This tactic suffered a temporary setback when the U.S. Supreme Court, recognizing that courts do not possess the power of the purse, held that awards of attorneys' fees were a matter Congress had reserved for itself, thus calling an abrupt halt to judicial fee awards without statutory authorization. However, the Court's decision (in *Alyeska Pipeline Co.* v. *Wilderness Society*) also invited Congress to legislate fee award provisions. There had been quite a few fee reimbursement provisions even before *Alyeska*, but the decision gave a new boost in this direction. Congress quickly legislated provisions for fee awards in civil rights cases, and moved with equal speed in other areas of the law. There are now well over one hundred statutes that authorize fee awards. While the American rule has never been formally renounced by an omnibus fee statute, it has been thoroughly emasculated.

The legislative history of most fee award statutes clearly indicates that Congress intended to restrict fee awards to groups or individuals who prevail; as noted above, awards to losing parties might encourage frivolous litigation. But this restriction has very often been ignored. In a number of environmental cases, courts have awarded fees to non-prevailing litigants on the grounds that their actions had generated "public benefits." Similarly, the National Association of Attorneys General, in a report to Congress on the Civil Rights Attorneys' Fees Awards Act, found that federal courts have been willing to award fees well in excess of statutory requirements. They have frequently characterized losing parties as "prevailing," thus allowing them to collect fee awards. In many other cases, fee awards were disproportionate to the degree of success achieved by the plaintiff. Many courts have assessed fees on the basis of "prevailing market rates," rather than the actual salaries of public interest attorneys. Since market rates are those of private law firms with high salaries, overhead, and profit margins, such decisions produce a windfall for public interest groups. Increasingly,

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courts have also multiplied fees for public interest attorneys, and awarded bonuses for "exceptionally complex" or "valuable" litigation.

While it is impossible to obtain precise data on federal expenditures for attorneys' fees, and no data exist for all fifty states and for local governments, it is certain that considerable sums are involved. Probably the best indicator of this is the growth of periodicals, newsletters, and law firms specializing in the complex and unpredictable, but also very lucrative, field of fee litigation. A rough 1982 estimate put the public expenditures under fee award provisions at $140 million. Not all of this money goes to public interest firms; in fact, most of the money is collected by the pro bono departments of established law firms that litigate cases under Title VII of the Civil Rights Act. But advocacy groups do benefit considerably from fee reimbursements. According to the Alliance for Justice (an umbrella organization of liberal public interest law firms), attorneys' fees collected by public interest groups tripled between 1979 and 1983, and constitute the fastest-growing source of funding for these organizations.

Public interest firms are "reimbursed" not only for litigation but also for their participation in agency proceedings. Like attorneys' fees, such "intervenor fees" became more widespread and generous in the course of the 1970s, due in large part to the efforts of the federal judiciary. In 1972, an appellate court still held that absent an enforceable contract or explicit statutory authority, administrative law judges could not authorize payments of attorneys' fees for intervention in administrative proceedings. Subsequently, however, the courts permitted and then gradually expanded fee reimbursements for intervening public interest groups if their work at the agency level could be considered an integral part of subsequent litigation. Eventually the judges held that agencies could regularly fund intervenors without statutory authority.

At the same time, agency funding practices became more liberal. Consumer agencies—the Environmental Protection Agency, the Food and Drug Administration, and others—were in the forefront of this development, but "hardware" agencies such as the Federal Energy Regulatory Commission were not far behind. Congress stepped in, too, and passed increasingly generous funding provisions. The Magnuson-Moss Act of 1975 authorized intervenor funding in the Federal Trade Commission on very lax conditions. The Toxic Substances Control Act, which is administered by the EPA, became one of the most far-reaching statutes; it offers refunds even

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for petitions. Although an omnibus bill to fund "citizen participation" in any and all regulatory proceedings, which was considered by Congress in the late 1970s, never saw the light of the day, the need for such a statute was less than overwhelming. Observers have counted some 225 intervenor-funding provisions, covering virtually all areas of public policy in which advocacy groups are active.

Conservative years, liberal growth

The liberal public interest movement can look back on almost two decades of virtually uninterrupted growth. While a few groups have on occasion suffered periods of distress, the number of firms and the budgets of all but a handful of organizations show impressive growth rates. Alliance for Justice data show that the overall income of public interest law firms increased by 85 per cent between 1975 and 1983. Contrary to what one might expect, the public interest movement's growth accelerated during the early Reagan years: The income of law firms increased from $40 million to only $49 million during the high-inflation period from 1975 to 1979, but more than doubled to $105 million in 1983. No comprehensive data exist for later years, but an examination of the budgets of selected public interest firms indicates that they have continued to grow, although at a somewhat slower pace.

A number of factors account for this phenomenon. The Administration's free-market, deregulatory rhetoric sent shockwaves through the public interest constituency, and led to an increase in private contributions to liberal advocacy groups during the early 1980s. (Reagan's combative Secretary of the Interior, James Watt, was known as the "Fort Knox of the environmental movement.") Private foundations by and large maintained their level of giving. And the public interest movement displayed some ingenuity in diversifying its financial base. For example, several mass membership organizations have convinced major banks to issue credit cards that carry a public interest group's name and logo. A small percentage of the cardholder's financial transactions goes to the group identified on the card. But the most remarkable aspect of the movement's expansion in the course of the 1980s is that the level of federal funding continued to increase. Taken together, governmental subsidies—discretionary grants, attorneys' fees, and intervenor fees—have grown at the same speed as the movement's total resources, and still constitute about one-third of its income.

As we near the end of the Reagan era, it is safe to conclude that the Administration has failed to implement any significant steps

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towards defunding the Left. The most notable failure has been the Legal Services Corporation, briefly discussed above. Not only has the Administration failed to win Congress's approval for its proposal to abolish the agency; Congress has even prevented significant cuts of the LSC's budget, and it has drastically curtailed the agency's discretion by prohibiting it from reducing support for any one of its grantees. Other initiatives the Reagan Administration has embarked upon have been similarly ill-fated. Fee awards have increased enormously in size and frequency. Statutory provisions authorizing fee shifting and reimbursements proliferated under the Carter Administration, with the ironic result that they developed their full fiscal impact, and their full usefulness for organized public interest advocacy, during the Reagan years. The administration's attempts to limit attorneys' fees have failed, due to fierce opposition in Congress and in the courts.

Several agencies have attempted to cut direct grants to public interest groups; for example, EPA grants to environmental organizations dried up almost completely during Anne Gorsuch's brief tenure. As a general matter, though, the Administration's efforts to cut discretionary spending for liberal activism have been characterized by a remarkable lack of success. In a few cases, agencies such as the National Endowment for the Humanities and the Justice Department have managed to make sizeable grants to conservative nonprofit organizations. Officials insist, however, that by and large the fiscal impact of this policy upon liberal groups has been negligible. Thus liberal litigators in 1983 collected $18 million in direct federal grants, and continue to collect sizeable fee awards. Similarly, some agency leaders (as at the Department of Education) were unable to break the career bureaucracy's inclination to give money to its liberal constituencies; others found that there were simply not enough qualified conservative groups around to absorb the agency's grants budget.

About the only fight the Administration conducted with some measure of success is the battle over the Combined Federal Campaign. In 1979, this annual fundraising effort, which allows charitable organizations to seek contributions from federal employees, was opened to advocacy groups. The Reagan Administration returned to the time-honored distinction between groups that are charitable in the traditional sense and political advocacy groups that are by statute tax-exempt, and excluded the latter from participating in the campaign. Public interest groups, for whom the campaign is a potentially rich source of revenue, sued the federal government.

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The Office of Personnel Management prevailed before the Supreme Court, which sanctioned the distinction between charities and advocacy groups. But Congress has prohibited OPM from spending any money to implement this decision. As a result, advocacy groups still participate in the federal campaign.

What, then, are the reasons for this rather dramatic failure? It may well be, as is frequently argued among conservatives, that the Reagan Administration's efforts to defund the Left were hampered by a lack of resolve and skillfulness. In fact, it is hard to escape the conclusion that the White House, the Justice Department, and regulatory agencies have not done nearly all they could have to curb governmental support for public interest advocacy and litigation. The Administration has been reluctant to invest serious political capital in the fight against ideologically motivated litigators and lobbyists; it has defended its proposals for defunding public interest groups mostly on technical-legal or on fiscal grounds, rather than mounting an open ideological battle against the movement and its patrons in Congress and on the federal bench.

Ultimately, however, this criticism misses the mark. The charge of incompetence is too facile, for even highly qualified and determined administrators such as Michael Horowitz at the Office of Management and Budget found themselves unable to curtail funding for liberal advocacy groups. Moreover, and more to the point, the expectation that the Administration would make a crusade against public interest groups a very high priority, and invest a lot of political capital in it, had always been unrealistic. The Administration soon came to realize that defunding was a fight it could not win without mounting an extraordinary effort that, put simply, was not worth the potential benefits. By and large, this assessment was correct: Government funding of advocacy groups had become too deeply engrained in the structure of American government to be stopped with a little more energy and maneuvering in Congress.

Congressional support

One of the reasons for the Administration's lack of success in defunding the Left is, at least at first sight, very simple and straightforward: Throughout the 1980s, the public interest movement continued to enjoy considerable support in Congress. Each branch of the movement—consumerists, environmentalists, feminists, civil rights groups, and so on—has its patrons on important committees and subcommittees. Not all of these "fixers" are members of the Democratic Left; support for public interest causes is remarkably

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broad. Until his retirement, the highly esteemed and influential Barber Conable, a moderate Republican, was among the staunchest supporters of Common Cause and other public interest lobbies; Republican Senator Warren Rudman is a fierce advocate of the LSC. These congressional sponsors managed to avert much unfavorable action against their clients, both in Congress and in governmental agencies.

At least some of the public interest movement's causes have remained genuinely popular. Environmental protection, for example, is a *very* popular cause; opinion polls have regularly shown broad public support for stringent regulation, and the national media support this agenda. But even when the issues are more controversial, most congressmen are reluctant to cast votes against the public interest movement and its agenda—either out of some vague desire to "do good," or out of fear that a vote against a bill pushed by some public interest constituency might be misunderstood as a vote against a good cause. This helps to explain why many public interest bills are passed by lopsided majorities, and quite a few unanimously.

Congress's support for causes that are, superficially or not, fairly popular, may not fully explain its continued support for public interest groups. One would think, for example, that congressmen could tell the difference between voting for clean-air legislation and financing the Natural Resources Defense Council, whose zero-growth, anti-capitalist agenda is decidedly not a majority position in Congress. And congressmen frequently do distance themselves from the agenda of the movements they support. Many congressmen who support the National Organization for Women, which defends *Roe* v. *Wade*, are "personally opposed to abortion," and may even vote against federal funding for abortion; others are firm supporters of the NAACP but publicly take a stand against some of the organization's objectives, such as racial quotas and busing; still others support the environmental movement, but will vote to rescue pork barrel projects from lawsuits brought by environmental groups.

Generally speaking, legislators can very easily maintain some distance from the groups and causes they promote, without having to withdraw their support for them. As noted at the outset, governmental financing of public interest groups is an extraordinarily murky affair, about which the public knows very little. The actual transfer of funds is performed far away from visible and politically accountable institutions. Congress itself writes the laws that authorize governmental funding, but it rarely hands out lump-sum grants to par-

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ticular groups. Congressmen are thus not directly responsible for grants made to advocacy groups, including those whose goals and activities may be unpalatable to the general public. The attraction of attorneys' fees, which Congress has continuously supported and expanded, is precisely that authority to award them rests with the courts, whose spending habits are largely immune from political interference.

Another reason the Left has continued to prosper is that existing funding provisions tend to create diverse constituencies in their support. For example, a sizeable portion of attorneys' fees is collected not by public interest groups but by big, for-profit law firms and their pro bono departments. The public interest movement was also intelligent enough to let small business groups profit from statutory fee provisions, thus adding another constituency whose support for such clauses has been crucial. Low bulk-mailing rates, for another example, are also supported by a broad and heterogeneous constituency that includes business. In addition, the advent of conservative public interest groups, which are funded to a large extent by business firms for whom tax deductability is important, provides the original ones with additional protection against defunding. Conservative advocates were among the sharpest critics of recent attempts to tighten the IRS rules that govern lobbying by 501(c)(3) organizations.

A third obstacle to defunding the Left is the role of the judiciary. As noted above, attorneys' and intervenor fees were promoted by the courts: Federal judges interpreted congressional fee authorizations very broadly, and they refused, by and large, to go along with the Reagan Administration's efforts to limit such awards. Courts have also ruled in favor of LSC grantees who were charged with fraud and abuse.

The judiciary's efforts could not have succeeded without Congress's willingness to endorse and sanction judicial preemptions of political authority. But Congress has done so more or less consistently, as is illustrated not only by the history of attorneys' and intervenor fees. Congress has also followed the judiciary's policy of providing public interest constituencies with expanded access to the courts by writing statutes with so-called "citizen standing" provisions, under which *anyone* can sue an agency for its actions (or inaction). And Congress has increasingly couched statutes in terms of entitlements rather than bureaucratic obligations, thus immunizing programs against budget cuts while simultaneously enabling private parties to assert their "rights" in court. This strategy of strengthen-

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ing the courts and the groups that use them allows congressmen to hide behind judicial doctrines and pronouncements, rather than taking full responsibility for unpopular results.

Conservative activists assumed, quite correctly, that public interest causes do not enjoy a stable, working majority in Congress. But no such majority is necessary to prevent defunding. Committees and subcommittees exert considerable oversight powers, and have used them to great effect. Moreover, advocacy groups have benefited from congressional inertia: Once the statutes that sustain the public interest movement were on the books, a conservative administration had to take the initiative to weaken or amend them, and in resisting such efforts, the movement's patrons proved to be at their very best. They could not invent ever-more ambitious rights, entitlements, and funding schemes, but they could easily thwart attacks on existing ones. For liberal congressmen, preserving the funding system is essentially cost-free: Conservative landslide or not, they can always hide behind the system's intricacies, its legalisms, or the rhetoric of rights and justice with which it has come to be endowed. For conservative and moderate congressmen who might oppose public interest causes, there is no overwhelming reason to join a defunding effort. Public funding for advocacy groups is extensive, and vital for the recipients, but the sums involved are simply too small to bring more than a handful of ideologically motivated legislators up against a movement that enjoys so much media support.

Interest groups and ideology

In hindsight, it is hard to escape the conclusion that the proponents of "defunding the Left" severely underestimated the difficulty and complexity of their task. This mistaken assessment was not the result of right-wing zealotry, for liberal groups made the same mistake and overestimated the dangers the Reagan Administration posed to their financial well-being. Rather, the expectation that defunding would be easy stemmed from a more basic misunderstanding.

At bottom, conservative and liberal activists alike considered government funding of public interest groups exceptional and unprecedented, largely because these groups are perceived—and perceive themselves—as outsiders and as fundamentally different from ordinary interest groups. If "public" interest groups were not different from private ones, there would be nothing exceptional or scandalous about the fact that they are publicly financed, for a general solicitude for private interests has been a distinctive feature of

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American government for several decades. The very premise of the New Deal was that it was not only legitimate for government but, in a sense, the very purpose of government, to accommodate societal interests. A formerly sharp line between private interests and public authority was blurred. Government not only became more accessible to interest groups, but also actively organized constituencies (such as farmers), and solicited their support for regulatory, legislative, and electoral purposes. "Public" interest groups, however, are thought of as diametrically opposed to the interest groups that flourished under the New Deal. Those "special" interests represent fairly narrow and well-defined concerns; public interest groups pride themselves on representing nothing but "the public's" broad and general interests. The former are based on monetary interests; the latter on ideas and principles. Their *raison d'être* is not the organization and representation of constituencies but advocacy of *ideology*.

The advocates of "defunding the Left" based their strategy on this distinction between private, "special" interest groups on the one hand, and ideological ones on the other. It is hard to blame them for thinking that this was a real, politically significant distinction. After all, Ralph Nader's claims to legitimacy rested on precisely the same conviction. He and other public interest advocates never tired of claiming that their organizations were *not* like all the other interest groups, which seek special favors at the public's expense. Public interest groups claimed to be the cure for the special interest state, not its caricature. For this reason (as well as the fear of "corruption"), public interest organizations initially did not accept governmental funding.

But the Left's attempt at self-justification and the conservative attempt to defund it failed for the same basic reason: Advocacy organizations are not all that different from ordinary, parochial interests. The NAACP, NOW, and the National Wildlife Federation speak for clearly identifiable constituencies with identifiable interests. In many organizations, elements of high-minded principle, radical politics, and economic interest are hard to disentangle (antinuclear organizations come to mind). Similarly, Congress cannot really tell the difference between a "non-political" program and its ideological use—between, for example, those LSC grantees that help the poor settle divorce cases and those that use the same grants to reform American society and its institutions through the courts. Under such conditions of uncertainty, Congress has come to err regularly on the side of generosity. From its perspective, public interest organizations look like every other group that clamors for

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assistance. It comes as no surprise that advocacy groups feed at the federal trough along with everyone else.

It is true that in order to allow public interest groups to challenge the power of entrenched lobbies, government has to give a little more direct support to the public interest groups—relative to the size of these bodies—than to economic interests, which are easier to organize. But public interest advocates are right in claiming that the subsidies they receive pale in comparison to the rents collected under various regulatory and legislative schemes by constituencies such as farmers, truckers, trade unions, steel manufacturers, and virtually every other interest. And once the distinction between interests and ideology disappeared, the difference between funding advocacy groups and rushing to the aid of Iowa worm farmers became, for Congress, a matter of degree. The judiciary decided, for reasons of its own, to furnish "underrepresented" interests with the clout they lacked in the political process.

Governmental financing of advocacy groups, then, is not an exotic practice, alien to the way American government ordinarily works. Nor is it simply a matter of the popularity of this or that ideological cause: The mechanisms that sustain the governmental support system are more deeply engrained. The hallmark of post-New Deal American government—the "special interest state" so derided by the public interest movement—was an identification of private claims for relief with governmental purposes or (what amounts to the same thing) an inability to draw a line between private interests and their public sponsorship. Until the 1960s, government still restricted its support to genuine constituencies in distress, and excluded from its generosity advocacy groups making arguments *about* distress on behalf of more amorphous constituencies, including "the public," and sometimes on behalf of no identifiable constituency at all. But this second line between interests and ideology was very hard to maintain and police, once the first line between public objectives and private interests had been thoroughly undermined. The advocates of defunding failed to grasp this point: Congress funds advocacy organizations not because it shares their ideology but because it can no longer bring itself to say "no" to anyone —even to ideologues.

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Public policy by prosecution

ARTHUR MAASS

IN NOVEMBER 1986, the White House Domestic Policy Council's Working Group on Federalism issued a "comprehensive report" analyzing the status of federalism in America. Echoing a policy objective of the Reagan presidency, the report called for greater attention to the traditional division of power between the federal and state governments. (The Working Group was chaired by Assistant Attorney General Charles J. Cooper, while the Domestic Policy Council was chaired by Attorney General Edwin Meese III.) Like the proponents of federalism in the Department of Justice, the report lamented the historical decline of the power and sovereignty of state governments:

> The last 200 years have witnessed the evisceration of federalism as a constitutional and political principle for allocating governmental power between the States and Washington. The Founding Fathers' vision of a limited national government of enumerated powers has gradually given way to an expansive, intrusive, and virtually omnipotent national government. States, once the hub of political activity and the very source of our political tradition, have been reduced—in significant part—to administrative units of the national government, their independent political

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> power usurped by almost two centuries of centralization. . . . The erosion of federalism and of state sovereignty represents a threat not only to good government but, more importantly, to constitutional government.

A lengthy chapter of the report, entitled "Restoring Federalism to American Government," discusses a variety of possible reforms involving both legislative and executive actions. But the report does not mention what may be the most serious and politically disabling federal intrusion of recent years into the independent political status of state and local governments—actions by the U.S. Department of Justice to police political corruption in state and local governments, by prosecuting state and local officials for local corruption. The significance of this policy should be understood: For if the principles of federalism and the constitutional system are to be maintained, the states must be free from federal interference in establishing their political institutions (provided they do not violate the basic rights of U.S. citizens guaranteed by the Constitution), and free to choose, discipline, and recall the public officials who serve these institutions.

In the fiscal year 1986, the ninety-three U.S. attorneys reported to the Department of Justice (DOJ) that they had indicted over one hundred elected or appointed state and local officials for corruption, that many more were awaiting trial, and that an unspecified number were under investigation by federal grand juries.

Local corruption, federal prosecution

Take the city of Boston as an example. Several employees of the Department of Inspectional Services were indicted for accepting payments to approve or expedite the granting of various types of building permits, as were several builders and contractors, for offering the payments. Federal prosecutors subpoenaed internal records of both the fire and police departments relating to approximately 250 bars, restaurants, and nightclubs in a search for evidence of payoffs to inspectors to overlook violations of the fire code and liquor-license regulations.

How have city building permits, fire code violations, and liquor licenses come to be an important concern of the federal government? How does this activity by the U.S. Department of Justice conform with traditional principles of American federalism?

The 1986 prosecutions in Boston are another chapter in a campaign begun there several years ago to root out what the U.S. attorney for Massachusetts perceived to be pervasive corruption in the administration of then-Mayor Kevin White. A major effort in 1984

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to reach the mayor himself had failed when the U.S. attorney was unable to put in place the penultimate stage of the prosecutorial pyramid that he had been building. One of the mayor's closest political advisers, his chief fund raiser, Theodore V. Anzalone, was indicted for political extortion under the Hobbs Act. The prosecutor's plan was to ask for a stiff sentence for Anzalone, who would subsequently have been granted leniency in return for a promise to testify as the government's chief witness against White. The jury, however, found Anzalone innocent—and the pyramid collapsed.

In 1986 the U.S. attorneys for the southern and eastern districts of New York targeted for investigation for political corruption, among others, the president of the Borough of Queens, the president of the Borough of the Bronx, the chairman of the Bronx County Democratic Committee, the former chairman of the Kings (Brooklyn) County Democratic Committee, and, in each case, some of their closest political associates. Borough presidents are popularly elected every four years along with the mayor, and county party chairmen are elected indirectly—by district or ward leaders who, in turn, are chosen every two years in the September primary elections. Among these, the principal target was Donald R. Manes, who was both Queens borough president and chairman of the Queens County Democratic Committee. To build a prosecutorial pyramid against Manes, the federal attorneys relied principally on his close friend, Geoffrey G. Lindenauer, deputy director of the Parking Violations Bureau, New York City Department of Transportation. Lindenauer was charged with mail fraud, extorting bribes from contractors, and racketeering, in a thirty-nine count indictment. After intense and lengthy negotiations with the U.S. attorney, he pled guilty to two counts, the others being dismissed in return for his agreement to cooperate with the prosecutors. In the meantime, Manes had resigned as borough president and party chairman; he committed suicide very soon after the Lindenauer deal was announced and, apparently, just before he would have been indicted.

The U.S. attorneys' principal target then became Stanley M. Friedman, Bronx County Democratic chairman, a former deputy mayor of New York City, and a close political associate of Manes and Lindenauer. He and a number of associates were indicted and convicted on various charges of municipal corruption (including bribery, extortion, and mail fraud), resulting in a "pattern of racketeering activity." Lindenauer was the principal witness against them.

In 1984 and 1985 the U.S. attorney in Manhattan had indicted or exacted guilty pleas for extortion and bribery from twenty-four

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New York City electrical, water, and sewer inspectors, whose job is to certify work done in private homes and other buildings, and from forty-four employees of the Housing Authority, who were involved in the repair and maintenance of housing projects.

Inspection of electrical, water, and sewer installations in homes and apartments—how has probity in the performance of these tasks come to be an important concern of the federal government? In this case an answer to the question is complicated by the fact that Mayor Edward Koch gladly forfeited jurisdiction to the federal government. At the several press conferences at which the charges and indictments were announced, the mayor stood next to the U.S. attorney and said that he wanted the defendants, who were his city employees, to be prosecuted under federal statutes, which carry stiffer penalties than state law, by federal prosecutors rather than the five borough district attorneys, in federal courts rather than those subject to "the vagaries" of different state judges.

When the U.S. attorneys quickly began to prosecute the mayor's political allies and elected officials, Mayor Koch was no longer to be seen at the press conferences. Instead, the mayor held his own press conferences, where he stated that he was very upset with the conduct of his good friends and close associates like "Donnie Manes," that he had become too close to Democratic party leaders and had allowed them to exercise undue influence over city government, and that he would act vigorously to root out corruption in the city. He did not ask what business it was of the federal government to try to extirpate corruption among elected municipal officials. Indeed, the mayor could not very well have asked this question even if he had wanted to, since he had in the previous year enthusiastically given up the city's jurisdiction over sixty-eight inspectors and maintenance men. But that does not mean that the question is not relevant.

Aggressive campaigns by U.S. attorneys against local political corruption were also underway in 1986 in Chicago, Philadelphia, Washington, and other cities, and against state political officials, including two governors and various state legislators, in Louisiana, Pennsylvania, New Mexico, California, and elsewhere.

The U.S. assistant attorney general in charge of the Criminal Division said in March 1986: "We've got a full-court press on this stuff." His boss, Attorney General Edwin Meese III, told a New York audience in April: "We intend to go on knocking such corrupt heads—that's our business, that's our duty." According to the U.S. attorney in the District of Columbia: "It's fair to describe this as a historic period. This is a crisis point for municipalities. It is a period

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that will tell the tale for the future of city governments." In early December the new director of the FBI in the New York area announced that the Bureau would be investigating officials throughout his region: "We're just not going to quit until we can identify, successfully investigate, and prosecute every corrupt politician in our territory." What is the source of the federal government's authority for so drastic an intrusion into state and local governments?

The short answer is that these activities are mostly recent ones, having begun only in 1974. They are basically unauthorized, are in important respects out of control, are questionable in terms of the federal nature of our constitutional system, and are clearly in conflict with the principles of federalism expressed in the Reagan Administration's task force report.

Absence of authorization

Until the 1970s the repeated campaigns against state and local political corruption had been led by citizens' committees, state legislative committees, and county and state prosecutors. The campaigns were conducted under state law and in state courts, with those found guilty confined to state prisons. Institutional reforms were enacted by city and state legislatures. No U.S. attorneys, attorneys general, or presidents claimed any part of the action. To be sure, a number of federal grant programs to state and local governments have been accompanied by a degree of federal supervision over the personnel employed by the states and cities to do the work supported by the programs. In addition, the Hatch Act, which restricted the political activities of regular federal civil servants, was extended in 1940 to state and local public servants whose principal employment is in activities financed by federal grants. But federal investigation and prosecution of those charged with the more familiar forms of local political corruption is a relatively recent activity. There are few exceptions to this generalization, the most important one resulting from President Franklin D. Roosevelt's efforts in 1934 to indict Senator Huey Long of Louisiana.

In 1975, Gerald R. Ford and Attorney General Edward H. Levi announced that investigation and prosecution of official corruption would be a priority of the U.S. Department of Justice. Their decision, prompted by Watergate, related principally to corruption in the federal government, but it was also used to launch a program against corruption in state and local governments. In the early 1970s, several U.S. attorneys had begun what were, in a sense, experiments or tests to find tools that would allow them to prosecute

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local political corruption. Levi selected Richard L. Thornburgh, U.S. attorney in Western Pennsylvania, as his new assistant attorney general in charge of the Criminal Division. Thornburgh created a Public Integrity Section in the division with "responsibility for overseeing the federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of government."

Table I illustrates the rapid growth of this activity since 1970. These data include the sixty-eight inspectors and maintenance men in New York City mentioned previously, as well as seven governors or former governors (Kerner in Illinois, Agnew in Maryland, Hall in Oklahoma, Moore in West Virginia, Mandel in Maryland, Blanton in Tennessee, Edwards in Louisiana) and many mayors (forty-three between 1970 and 1977 by one count), state legislators (sixty in the same period), sheriffs, county commissioners, and other elected officials. By what authority did the Department of Justice initiate and conduct what the first chief of the Public Integrity Section called a new "federal effort to insure the integrity of our public institutions at the state and local . . . level of government"?

Table I. Elected or Appointed Officials Indicted, Awaiting Trial on December 31, and Convicted of Offenses Involving Abuse of Public Office, by Level of Government, 1970-85[a]

	State			*Local*			*Total*		
	Indicted	*Awaiting trial on Dec. 31*	*Convicted*	*Indicted*	*Awaiting trial on Dec. 31*	*Convicted*	*Indicted*	*Awaiting trial on Dec. 31*	*Convicted*
Total	787	267	595	2,735	918	1,993	3,522	1,185	2,588
1970 . . .	10	0	7	26	0	16	36	0	23
1971 . . .	21	0	16	46	0	28	67	0	44
1972 . . .	17	0	10	106	0	75	123	0	85
1973 . . .	19	0	17	85	2	64	104	2	81
1974 . . .	36	0	23	130	4	87	166	4	110
1975 . . .	36	5	18	139	15	94	175	20	112
1976 . . .	59	30	35	194	98	100	253	128	135
1977 . . .	50	33	38	157	62	164	207	95	202
1978 . . .	55	20	56	171	72	127	226	92	183
1979 . . .	58	30	32	212	67	156	270	97	188
1980 . . .	72	28	51	247	82	168	319	110	219
1981 . . .	87	36	66	244	102	211	331	138	277
1982 . . .	49	18	43	257	58	232	306	76	275
1983 . . .	81	26	65	270	61	226	351	87	291
1984 . . .	58	21	52	203	74	196	261	95	248
1985 . . .	79	20	66	248	221	49	327	241	115

[a] Source: U.S. Department of Justice, Criminal Division, "Report to Congress on the Activities and Operations of the Public Integrity Section," 1981 and 1985.

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Governmental programs are authorized by legislation. A typical authorizing statute—the Clean Air Act, the Immigration Act, the Arms Export Control Act, the Omnibus Anti-Drug Act—states the broad objectives of a program, specifies the means to be used to carry it out, limits the funds that may be appropriated or otherwise applied to the program, sets standards and criteria to control the administrator's discretion, designates the circumstances under which administrative decisions are subject to court review, determines civil and/or criminal penalties for noncompliance, and frequently sets out procedures for continuous or periodic oversight and review of the program by the executive branch and the Congress. The authorizing statute also provides guidance for U.S. attorneys and controls their conduct when, on behalf of the agency that administers the program, they prosecute those who fail to comply with the law.

The authorizing statute is the result of discussion and debate in a legislative process that records the combined judgment of popularly elected delegates—the president and members of the Congress—and that provides ample means for these delegates to be informed by experts, interest groups, and political leaders before they pass judgment.

When the Department of Justice, in the mid-1970s, decided to mount a program to ensure the integrity of public institutions in the states and their localities, one would have expected departmental officials to draft legislation authorizing the program and submit it to the Congress for enactment. There, no doubt, the proposal would have been discussed and debated in terms of its impact on federalism as well as its other merits. Yet this didn't happen. Instead, the department encouraged U.S. attorneys to prosecute local political corruption under four existing criminal statutes that had not previously been considered applicable to the subject. As a consequence, none of the statutory provisions that normally are used to direct and control governmental programs have been available.

Before discussing the techniques that have been used to carry out the program in the absence of any authorization, I should be more explicit about the activity itself. I am concerned, as is DOJ, with federal prosecution of state and local officials who are accused of political corruption, especially elected officials and their close associates. Thus I do not consider the following categories of offenses:

(1) Prosecution of state and local officials for violating the basic constitutional rights of citizens. For this reason, and due to the complex interrelation between the basic constitutional right to vote

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and various statutory provisions related to this right, I exclude cases involving minority voting rights, apportionment, candidate access to the ballot, and election fraud, although certain types of electoral fraud are typically associated with political corruption.

(2) Prosecution of crimes committed by state and local officials that infringe on readily identifiable primary federal interests. These include such matters as national defense, the safety of federal officers, enforcement of federal regulatory statutes, and the need to ensure the integrity of federal administrative processes against bribery, fraud, conflict of interest, and other abuses. In short, I exclude conduct that poses a threat to federal institutions and operations.

(3) Prosecution of state and local officials for criminal behavior for which any citizen would normally be prosecuted. This includes such offenses as kidnapping and tax fraud, except where the offense is a pretext for attacking local political corruption. I do not argue that elected state and local officials are in a special class, immune from criminal prosecution under federal laws.

The "prosecutor/craftsman"

The four laws that have been applied to local corruption are Mail Fraud, Hobbs Act, Travel Act, and RICO (for Racketeer Influenced and Corrupt Organizations). Neither the statutory language nor the legislative histories of these laws authorize their application to local political corruption. If the federal legislators had intended that the acts be used for a purpose as politically sensitive as prosecuting elected state and local officials, it seems likely that they would have mentioned it in the legislative history, if not in the language of the statute. Nonetheless, certain U.S. attorneys believed that these statutes were amenable to "creative" interpretation beyond the intent of the drafters, and their efforts have won the support of federal courts. The chief of the Public Integrity Section of the Justice Department's Criminal Division in 1977 celebrated the legal craftsmanship of the successful prosecutors. "It is the reality of the prosecutor/craftsman that is responsible for a number of relatively recent legal developments which can only be characterized as breakthroughs in the federal effort to insure the integrity of [state and local governments]."

As an example, consider the mail fraud statute. Originally enacted in 1872, it prohibits use of the mails for "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Until recently, it was principally applied against classic swindles and lottery and securities fraud schemes.

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In addition to the fact that the statute was not meant to apply to cases of political corruption by state and local officials, prosecutors had to overcome other obstacles in order to use it for this purpose. The principal obstacle is the difficulty of establishing that public officials who, while using the mails in a minimal way, accept payoffs from petitioners in return for their aid in gaining approval of the petitions, can be said to intentionally defraud the public of something of value within the meaning of the statute. Since it cannot be proved in many cases that the public is defrauded of money, property, or anything of tangible value by virtue of the payoff, the prosecutors claim "creatively" that a scheme to defraud can involve intangible as well as tangible values, and that in cases of political corruption, officials deprive citizens of an important intangible value—the "loyal and faithful services" of their public servants. Citizens thus become victims of the scheme to defraud because they are deprived of their intangible "right to conscientious, loyal, faithful, disinterested, and honest government."

Since the early 1970s several prosecutions of state and local officials have employed this stratagem, which was endorsed by judges of the circuit courts. Thus the U.S. attorney for Northern Illinois in 1973 obtained the conviction and imprisonment of Otto Kerner, Jr., then a U.S. Court of Appeals judge, for his previous conduct as governor of Illinois. In 1975-77, the U.S. attorney for Maryland did the same for Governor Marvin Mandel. In both cases the payoffs were made for favorable action on dates approved for race track operations. Without the creative interpretation of intangible rights, however, it would have been virtually impossible to prove that the public had been defrauded of anything of value under the mail fraud statute. Only recently (24 June 1987), after fifteen years' aggressive use by federal prosecutors of the doctrine of intangible rights, did the U.S. Supreme Court confront the issue. The court then decided, by a vote of seven to two, that the mail fraud statute was not intended to "proscribe schemes to defraud citizens of their intangible rights to honest and impartial government"; it thereby undid much of the U.S. attorneys' legal craftsmanship of the early 1970s. The court said: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [it] as limited in scope to the protection of property rights" (*McNally* v. *U.S.*).[1]

[1] In the longer *Publius* article from which this one is extracted I also trace the "creative" interpretation of the other three statutes by "prosecutor/craftsmen" among the U.S. attorneys.

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Table II. Elected or Appointed State and Local Officials Indicted for Official Corruption, by Offense, Fiscal Years 1980-1986[a]

Offense	*1981*	*1982*	*1983*	*1984*	*1985*	*1986*	*Total*
Total	183	228	203	209	160	119	1,102
Mail Fraud	18	56	22	22	45	30	192
Hobbs Act	39	25	35	70	44	45	258
Travel Act	12	14	9	10	5	1	51
RICO	21	15	22	51	14	12	135
Conspiracy[b]	65	99	74	6	14	1	258
Aiding & Abetting[b]	0	2	3	4	4	1	14
Perjury & Obstruction of Justice	4	2	8	3	5	1	23
All other[c]	24	15	31	44	29	28	171

[a] Source: U.S. Department of Justice, Executive Office for U.S. Attorneys, Computer Data Base.

[b] Conspiracy and aiding and abetting can relate to a variety of criminal offenses. In order to know the underlying offenses in these cases one would need to see the indictments. There is good reason to believe, however, that for most of them the predicate offense is mail fraud, and for an additional number, the Travel Act.

[c] This category includes a wide variety of offenses under seven different titles of the U.S. Code, in only two of which are there more than a few—federal bribery and graft (sixteen cases) and federal fraud (twelve cases).

Table II shows the number of state and local officials indicted for political corruption between the years 1980 and 1986 under each of these statutes as well as indictments for conspiracy, aiding and abetting, perjury, and obstruction of justice, which were in large part related to the same offenses. Where defendants were indicted on several counts, the data give only the principal charge as determined by U.S. attorneys. The number of indictments reported in Table II for the years 1980-85 is significantly smaller than that in Table I because the tables are, unavoidably, based on different data: Table I, on an annual questionnaire distributed by the Public Integrity Section to all U.S. attorneys; Table II, on unpublished computerized records of the Executive Office for U.S. Attorneys.

Lacking clear legislative authority, proponents of the state and local public integrity program have put forward a nonstatutory justification for their activities—namely, that U.S. attorneys should prosecute corrupt state and local officials because local prosecutors, who are thought to be too closely tied to the corruptors, are unlikely to do so. However convincing this justification may be, it cannot properly be used as a substitute for statutory authorization. Moreover, the history of local political corruption in America does not even support the argument. Prosecution and reform have always come from within the states and cities—before the 1970s, that is. The newspapers of New York City, Boston, and elsewhere have hardly been reluctant over the years to investigate and expose official corruption. Nor have voters been hesitant to punish corrupt officials

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or complacent district attorneys, replacing them with candidates who promise reform and prosecution. The results of the democratic process in the states and cities may not always be to the liking of federal prosecutors, but would they argue that their morality and judgment should be substituted for that of the voters?

Overlap and conflict

If local attitudes toward corruption did not justify federal intervention before the 1970s, neither do they today. Take New York City in 1986 as an example. At the same time that the U.S. attorneys were prosecuting the public officials mentioned at the beginning of this article, the popularly elected district attorneys from the several boroughs were prosecuting as many or more, some of them the same officials, and for the same or similar charges as in the federal cases. The Manhattan district attorney had indicted Stanley M. Friedman in state court long before the U.S. attorney obtained his indictment. There was bitter conflict between the two prosecutors over which trial would be first; the U.S. attorney won. The Manhattan district attorney also indicted the former president of the city's Health and Hospitals Corporation and a former transportation commissioner. The district attorney in Queens conducted a major investigation of cable TV franchises, involving Donald R. Manes, the late borough president; Judge Francis X. Smith, administrative judge of the state supreme court in Queens, and formerly president of the New York City Council; and John A. Zaccaro, husband of Geraldine A. Ferraro, the Democratic candidate for vice-president of the United States in 1984. Smith and Zaccaro were indicted.

In the Bronx, the district attorney, with the aid of a state grand jury, had begun investigating Borough President Stanley Simon, Democratic leader Stanley M. Friedman, and others, well before Friedman's trial in federal court. And in Brooklyn, the district attorney had impanelled a grand jury in his investigation of involvement of officials of the city Taxi and Limousine Commission in the granting of taxi medallions and the purchase of meters by taxi companies. The U.S. attorney presented evidence on these same matters to a federal grand jury and was the first to bring an indictment.

Although there was sporadic cooperation between U.S. attorneys and district attorneys in some of these investigations, there was also open conflict and an underlying resentment by the district attorneys of the federal intrusion on their territory. "Fraud, extortion, bribery—these are basically local crimes," said Robert M. Morgenthau, the Manhattan prosecutor.

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Simultaneously, the mayor and governor were active, authorizing investigations, issuing executive remedial orders, and proposing new legislation. Thus, in March the mayor and governor jointly appointed a Commission on Integrity in Government, chaired by the president of Columbia University, to investigate the causes of corruption and recommend reforms. In several reports this commission recommended a number of new conflict of interest and financial disclosure laws.

At the end of the year, the governor of New York, Mario Cuomo, appointed a new Commission on Government Integrity, with subpoena powers. Cuomo said that he would have appointed the group earlier but that the U.S. attorney for Southern New York had been opposed, fearing that to do so might interfere with his ongoing federal prosecutions. The U.S. attorney, said the governor, had withdrawn his objection after obtaining a conviction of the Bronx County Democratic chairman in late November.

In addition, Mayor Koch took the following actions, among others: (1) he appointed a committee to review all city contracts proposed to be awarded without competitive bidding before the contracts are presented to the Board of Estimate for approval; (2) he established an advisory council on collection agency contracts; (3) by executive order he imposed stiffer financial disclosure requirements on nearly 3,000 decision-making employees under his direct control, and made other proposals on this general subject, some of which were enacted by the city council and others by the state legislature; (4) he proposed an ordinance, which was passed by the city council, imposing stricter financial disclosure requirements on lobbyists and banning all party officials from lobbying; (5) he proposed a law, which was passed by the state legislature, limiting contributions to a member of the Board of Estimate by any person having an interest in the board's decisions; (6) he created by executive order a committee on appointments to screen candidates for city commissions and boards; and (7) he reorganized the city's inspector-general system.

Numerous inspection and audit reports by the city's comptroller, the city Department of Investigation, special investigators appointed by the mayor, the state comptroller, and the state Commission on Investigation were discussed in public and contributed to various executive and legislative reform initiatives. New York City, then, provides little evidence for the proposition that the cities and states are paralyzed in acting against political corruption in their own institutions.

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An uncontrolled activity

The discretion available to administrators (i.e., prosecutors) in the DOJ's public integrity program for state and local governments is immense. Yet legislative, executive, and judicial controls over the exercise of this discretion are unusually weak, due principally to the absence of any basic authorization for the program, certain special characteristics of the office of U.S. attorney, and claims for bureaucratic independence based on the doctrine of prosecutorial discretion.

Without statutory guidelines concerning the objectives of the program or the means for carrying it out, the Criminal Division and the U.S. attorneys have adopted a remarkably simplistic standard for evaluating their performance: They demonstrate that they have indicted and convicted more state and local officials in any one year than in previous years. The annual reports of the Public Integrity Section, for example, make no effort to show how these increasing numbers of prosecutions relate to the integrity of state and local public institutions. Here is a typical statement, from the 1984 report:

> 1984 was a productive and successful year for the Section. In the years since the Section was founded, strides have been made in the federal effort to combat public corruption, as the statistics gathered at the end of this Report suggest. The number of convictions of those who betray their public trust has increased over the years and continued at a high level in 1984. Nevertheless, much remains to be done, and corruption continues to be one of the most difficult law enforcement problems facing federal prosecutors today.

The special character of U.S. attorneys' offices is in part a consequence of historical development. The office of attorney general was established by the Judiciary Act of 1789, which also created a system of district courts to which were attached "district attorneys" responsible for representing the federal government. Only in 1861 were these district attorneys brought under the nominal control of the attorney general. In 1870 formal centralization of control was completed in legislation that created the Department of Justice and continued the attorney general's authority to supervise the activities of the U.S. attorneys, but effective supervision did not come for many years thereafter. As Professor James Eisenstein reports in his 1978 book on U.S. attorneys: "The legacy of this early independence . . . helps produce a degree of autonomy and independence from the department perhaps unmatched by any other field service in the federal government."

To this day U.S. attorneys, unlike the regional directors of other

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departments and agencies, are nominated by the president, confirmed by the Senate, and can be removed from office only by the president. They are frequently persons of political importance and/or political ambition in their states, and in most cases they will have been proposed for their jobs by state and local leaders of the president's party.

Nonetheless, for most of the activities of the U.S. attorneys, there are effective controls. In a typical year, the ninety-three U.S. attorneys' offices handle approximately 100,000 civil cases and 30,000 criminal cases. In a significant proportion of these cases, prosecutions for violation of federal statutes and regulations have been requested by the agencies that administer the relevant programs, based on investigations conducted by the agencies. Thus, oversight of the performance of U.S. attorneys occurs in the context of executive and legislative evaluation of the enforcement activities of the program agencies themselves, in connection with renewals of their authorizations, annual appropriations, and other oversight processes. A sometimes important concern in these evaluations is how the U.S. attorneys have exercised their discretion in accepting or declining to prosecute cases proposed by the agencies. Yet there is no equivalent opportunity for effective oversight of the program against corruption in state and local governments, since it is administered by the U.S. attorneys themselves and the Criminal Division of the DOJ.

Broadening prosecutorial autonomy

Absence of control over the program also results from claims by its supporters that no institutions of government, with the possible exception of the attorney general and the assistant attorneys general —not the presidency, not the Congress, not the courts—should be allowed to interfere with or to second guess a federal attorney's prosecutorial discretion (i.e., his decision on whether to prosecute a case). Since one of the principal purposes of the authorization, appropriation, and oversight processes is to control the discretion of executive officers, and since the decision to prosecute is likely to be a major policy decision, we should inquire into the grounds for this broad claim of autonomy. (Keep in mind that this discussion concerns executive and legislative interference with prosecutorial charging discretion, not interference with pending or ongoing trials, which would raise very different questions.)

Federal courts have held that judicial review of prosecutorial discretion unconstitutionally violates the principle of separation of powers. They have also held that it would be unwise: "In the absence of statutorially defined standards governing reviewability, or regu-

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latory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary."[2] Obviously, the separation of powers restriction does not apply to the review of prosecutorial discretion by the executive branch and the Congress. Nonetheless, autonomy of prosecutorial discretion has been broadened so expansively in practice that, ultimately, a part of the bureaucracy has been insulated from popular influence and popular control.

The combination of these three factors—lack of authorization, independence of U.S. attorneys, claims for autonomy based on prosecutorial discretion—appears to have weakened departmental as well as congressional control over the program to combat state and local corruption. The DOJ has not promulgated guidelines for screening local corruption prosecutions as it has in other areas, such as labor racketeering and prosecution of election offenses. More generally, leading criminal law experts—Dean James Vorenberg of the Harvard Law School, for one—and the Senate Judiciary Committee have complained about the absence of departmental guidelines to control the prosecutorial discretion of U.S. attorneys.

As for review of individual cases, Philip Heymann, speaking from his experience as assistant attorney general in charge of the Criminal Division, said in an interview with the author that no one in the DOJ believed that they should control public integrity cases in the field, where U.S. attorneys should have wide, although not necessarily absolute, discretion. The Criminal Division would normally provide little more than advice, and this only if a U.S. attorney came to Washington to ask for it. To be sure, the U.S. Attorneys' Manual provides that in any case under the Hobbs Act involving a public official's misuse of his office, the U.S. attorney must consult with the Public Integrity Section prior to instituting grand jury proceedings or seeking an indictment; and that where the U.S. attorney contemplates prosecution under RICO, he must submit to the Criminal Division for review his prosecutive memorandum and draft of indictment, although he need not obtain prior authorization to conduct a grand jury investigation based on possible violations. These reviews, however, are in terms of statutory construction, including whether the proposed indictment might better be brought under another statute. They do not concern the wisdom or propriety of an indictment, whether it might involve political bias, or other policy implications. Furthermore, the review is conducted at a fairly low level of the DOJ. Heymann never saw one in his tenure as assistant attorney general. In testifying before

[2] *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477F. 2d 375, 380-81, 1983.

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the House Judiciary Committee in 1983, then-Attorney General William French Smith was asked whether the department had a coherent policy on the prosecution of high-ranking officials. He answered: "I don't know whether it rises to the dignity of a policy, but it's certainly a practice; and that is that the U.S. attorneys will make those decisions themselves."

In an environment in which the executive conducts a program without clear statutory authorization, relying instead on creative interpretations of laws that were not intended for the purpose by the legislators, one would expect the courts to be especially active in controlling the program. Yet the courts have more nearly been handmaidens of the prosecutors than their overseers. Indeed, in their alacrity to support each of the prosecutors' successive innovative interpretations, the courts appear not to have stopped long enough to look over their shoulders and assess the impact of their actions on federalism and the constitutional system. Furthermore, in their eagerness to support federal prosecution of corrupt state and local officials, judges have been prepared to disregard two of their self-imposed canons of statutory construction. The first is strict construction of criminal statutes: "Where there is an ambiguity in a criminal statute, doubts are resolved in favor of the defendant." The second canon involves a clear statement rule and federalism: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." (Both quotations are from *U.S.* v. *Bass*, 1971.)

The prosecutorial mode of making public policy

What we have here, then, is the formulation and execution of public policy in a prosecutorial mode. Instead of a decision-making arena characterized by public policy analysis, specification of objectives, program initiation, review, oversight, and evaluation, we are in another ring dominated by the behavior and mentality of the criminal law profession, in which the purpose is—with a great deal of simplification, to be sure—to lock up bad people as an expression of public morality more than to formulate and implement a public policy. Our political institutions are not nearly so well adapted for this alternative mode of decision-making.

In the public policy mode, a regional administrator, for example, studies the statute that authorizes his program, its legislative history, and relevant executive orders and departmental guidelines to determine as nearly as he can the goals to be pursued. He examines the same sources for any advice and constraints relating to organization and strategies for implementing the program. He studies avail-

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able regional facts that are relevant to the activity. Within this framework, and exercising the administrative discretion that remains available to him, he develops a program for his region.

In the prosecutorial mode, when it relates to alleged political corruption among elected state and local officials, a U.S. attorney, or agents of the FBI or some other investigative agency, acquire a sense that a public official or a city administration is, or may be, corrupt. To collect evidence to confirm this sense, they open an investigation, for which there is a vast array of resources that must be organized, including grand juries and agents, examiners, and auditors of the FBI, Drug Enforcement Administration, Internal Revenue Service, Bureau of Alcohol, Tobacco and Firearms, Customs Service, bank examining agencies, Marshals' Service, Postal Inspection Service, and Secret Service. With information from the investigation, the U.S. attorney pages through the statute books to discover provisions under which similar conduct has been found to be criminal. If there are no clear provisions, he may put to work his talents as a legal craftsman, to interpret a statute creatively so that it fits the facts. He then obtains an indictment from a grand jury and decides on his prosecutorial tactics, which may include plea bargaining, pyramid building, and much more.

Daniel J. Hurson, based on his six years' experience as assistant U.S. attorney for Maryland, described the process in this way:

> Normally such investigations . . . are not brought with the aim of indicting offenses under a particular statute. Rather, prosecutors, often working with agents from any of a number of federal agencies . . . enmesh themselves in lengthy, complex investigations with hardly a thought as to what statute may ultimately be used to indict. The emphasis instead is on gathering facts and putting together an indictable, ultimately winnable case. . . . The net result of this process is a crazy quilt of leads and forays, disparagingly characterized by defense attorneys as 'fishing expeditions.' There may be little coherence to these investigations in terms of initial direction or specification. Most prosecutors simply look to develop good cases wherever they can find them, and the more prominent the target the more interest they have.

The prosecutorial mind-set

The practitioners of this mode of public policy decision-making have their own mind-set, which focuses on prosecutions, more each year, and gives little attention to other policy objectives, such as adhering to the principles of federalism. When confronted with the question of who should prosecute corrupt state and local officials, the federal government or the states, federal prosecutors respond that it is simply a matter of efficiency and comparative advantage (i.e., whichever is more likely to put the offenders behind bars).

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The prosecutorial mind-set has certain other characteristics that are not typically found among those who practice the public policy mode of decision-making. Since the discretion of the prosecutors of state and local officials is so broad that they have a fairly free hand to make public policy as well as to implement it, one needs to pay attention to these characteristics. The principal one is being demonstrably tough and fearless. As Heymann has said: "Within the law enforcement community a willingness to go after powerful officials without fear or favor is a subject of great pride." A recent profile in the *New York Times* of a newly appointed U.S. attorney for the Eastern District of New York (Brooklyn and Queens) compares his tough, aggressive, and cunning performance as federal prosecutor with these same qualities displayed in the boxing ring when, as a student at the U.S. Military Academy, he won an intercollegiate championship. The U.S. attorney for the Middle District of Florida is highly controversial because of his investigations of elected officials. His supporters count him as "a combative federal prosecutor who is undaunted by political pressure as he pursues corrupt office holders." In reporting this, the *New York Times* also noted that he is a former Notre Dame football player.

The prosecutorial mode of decision-making and the prosecutorial mind-set, in association with the vast discretion given to U.S. attorneys, can lead to a selective, nonuniform, and uncertain use of criminal law to foster the morality of individual federal prosecutors. Whether a particular form of allegedly corrupt activity is prosecuted may depend on where it takes place. According to Charles C.F. Ruff, a former federal prosecutor, a "substantial risk exists that the corrupt public official in New Jersey will be treated differently from the corrupt public official in Nebraska."

This combination of factors can also lead to a selective and nonuniform use of criminal law to foster partisan politics and personal political ambitions. As for partisan politics, there is insufficient evidence to support the charge that the Republican DOJ is interested primarily in embarrassing Democratic officeholders in the states and cities. The public integrity program for state and local officials was given its initial boost by President Gerald R. Ford, and then pursued with vigor by President Jimmy Carter. It was downplayed initially but then given greater attention by the Reagan Administration. A program to clean up corruption in cities will inevitably target Democrats, for there are few Republican city machines. However, the Republican state organization in Pennsylvania was devastated in 1986 by federal indictments brought against the state treasurer (who, after he was convicted, committed suicide in public)

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and a former party chairman. Other senior officials of the party were also implicated in public corruption. Above all, it is the prosecutorial mentality, not party ideology, that drives the program.

There is considerable circumstantial evidence, on the other hand, to support the charge that U.S. attorneys have used successful prosecution of elected state and local officials to promote their own political ambitions. For example, James R. Thompson, Republican U.S. attorney in Northern Illinois from 1971-75, sent former Democratic Governor Otto Kerner and members of the Daley machine in Chicago to federal jails. Thompson was elected governor of Illinois in 1976. Richard L. Thornburgh, U.S. attorney in Western Pennsylvania from 1969-75, gained notoriety for prosecuting state and local officials, including city councilmen and mayors in towns surrounding Pittsburgh, and the elected district attorney of Allegheny County. He was called to Washington in 1975 by President Ford to be assistant attorney general in charge of the Criminal Division, where he established the Public Integrity Section. He was elected governor of Pennsylvania in 1978. Before being appointed U.S. attorney for Massachusetts in 1981, William F. Weld had run unsuccessfully as Republican candidate for state attorney general. In light of public attention gained by his prosecutions of members of the Kevin White Administration and others, he was reported by the Boston papers to be considering another run for statewide office in 1986, when he was appointed assistant attorney general in charge of the Criminal Division. Weld's predecessor as U.S. attorney, Edward Harrington, a Democrat appointed by President Carter, who had also prosecuted state and local officials, switched to the Republican party after he was replaced by Weld. In 1986 he ran unsuccessfully for state attorney general.

Consequences for federalism

The three closely related prosecutorial characteristics—decision-making mode, mind-set, and broad discretion—as they are used in the public integrity program for state and local governments, have ramifications beyond the administration of criminal justice. More importantly, they affect the delicate relationship between the federal and state governments.

Cleaning up political corruption in state and local governments is not enumerated or implied as a power of the federal government in the Constitution. To the contrary, the structure of the Constitution, the political debates and compromises involved in its drafting and adoption, and its early history argue for denial of such a power. To be sure, the Constitution provides in Article IV, Section 4 that

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the United States shall guarantee to every state a republican form of government, but the Supreme Court's interpretation of this seldom-used provision makes it inapplicable to our concerns with political corruption.

In *McCulloch* v. *Maryland* (1819) Chief Justice John Marshall, applying the national supremacy clause of the Constitution (Article VI, Clause 2), argued in general that states may not retard, impede, burden, or control instrumentalities of the federal government. And although there is no early opinion of the Court that argues that the federal government may not seek control over instrumentalities of the states, the principle that the states were to be independent of the federal government and that, therefore, the federal government could not impair the fundamental aspects of state sovereignty, was universally understood.

Over the years the Supreme Court has, without notable success, tried to define these fundamental aspects of state sovereignty. In a recent case, *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985), a majority of the court refused to state an affirmative limit that would apply to the reach of the federal government under the Commerce Clause, holding that this should be done in the legislative process. The question was whether federal regulations to implement the Fair Labor Standards Act could be applied to public transit workers. The court, holding that this was a permissible federal intrusion on a state instrumentality, said:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. . . .
>
> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. We note and accept Justice Frankfurter's observation in *New York* v. *United States*: ". . . Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court" [citations omitted].

Four justices dissented from *Garcia* in strongly worded opinions. Justice Lewis Powell held that the majority decision "reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution." The White House Working Group on Federalism concluded that "the nadir (it is hoped) in the decline of federalism" was reached in 1985 in the *Garcia* case.

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The nadir of federalism may already have been reached in the 1970s, however, when the Department of Justice assigned high priority to its new program to improve the integrity of state and local governments by prosecuting corrupt officials. *Garcia* deals with a state instrumentality, the San Antonio Metropolitan Transit Authority; the public integrity program deals with politically more sensitive instrumentalities involving elected as well as appointed officials. *Garcia* concerns the application of federal wage-and-hour regulations to public transit employees; the public integrity program concerns sensitive issues of political corruption. In *Garcia* the application of federal regulations to state employees is authorized by statute. The Supreme Court was simply upholding the statute, and the Congress can amend it to exclude state and local employees. The public integrity program, on the other hand, is not authorized by statute and operates, therefore, without normal legislative limitations. The political process which "ensures that laws that unduly burden the States will not be promulgated" has not been triggered.

If the Supreme Court were confronted squarely with a case involving the public integrity program, one wonders if the justices would not feel compelled to "identify or define what affirmative limits the constitutional structure imposes on federal action affecting the States." The Court has said that "the United States . . . has no power to regulate local political activities as such of state officials" (*Oklahoma* v. *Civil Service Commission*, 1947). The states, on the other hand, have a special interest in policing their own political processes. Responsibility for defense against political corruption lies normally with the people who elect their officials and with the judicial machinery that they establish to combat corruption.

The Congress can, by choosing to authorize the public integrity program, place it under legislative restraints. If the president and the Congress were to draft and enact such legislation, the legislative process would very likely focus attention on the issues of federalism inherent in the program. The federal government might ultimately do little to defend the states and the principles of federalism in this context. We simply do not know. Such a result, however, if it were reached after deliberation and debate, would be very different from the present situation. Uniform, controlled, and articulated standards would in all likelihood result in greater restraint of constitutionally questionable federal intrusion into state and local politics. But even if this turned out not to be the case, the federal government, in contrast with the situation today, would be acting with the explicit approval of the people's elected representatives.

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A REPLY TO ARTHUR MAASS

The Risks of Corruption

PHILIP B. HEYMANN

LAW-ENFORCEMENT authorities, prosecutors, and investigators do three things. They prosecute acts that are very widely regarded as harmful and immoral as well as illegal. In choosing among the possible candidates in this category the central criterion is probably a general sense of moral outrage at what was done. More rarely, they attempt to catch particular individuals or organizations who they believe are engaged in serious, ongoing criminal behavior and bring whatever charges can sensibly and fairly be brought against such individuals or groups. Here the focus is likely to be based on a judgment of dangerousness. Extremely rarely, they are charged with carrying out a program designed to deal with a problem the legislature has identified. Perhaps the problem of bribes paid by American corporations to foreign officials and the congressional determination to stop that practice in the late seventies is an example. Often, of course, there is some overlap in the three categories, particularly between the first two. The fact that the third is extremely rare accounts for the almost complete absence of legislative consideration of programs for law-enforcement authorities of the sort that Professor Maass urges.

In the area of federal law enforcement there are many more acts chargeable under federal statutes than investigators and prosecutors can pursue. The responsibility for choosing has, in recent years, been allocated in the following way: The attorney general has announced the broad areas of emphasis such as narcotics, organized crime, fraud, and public corruption; the federal priorities are chosen as (a) important matters that (b) the localities either cannot or will not make the focus of extensive, effective enforcement effort; then the individual U.S. attorneys throughout the country are left with substantial independence as to the weight to be given to each of the priority categories, the emphasis to be given within each broad category, and the wisdom and fairness of pursuing any particular case. Realistically, a great deal also turns on what the next levels—the line attorneys and the investigative agents—think about a particular charge in terms of both the moral outrage it arouses and the strength of the evidence that supports it. If there is relatively little control from above, it is because higher bureaucratic

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levels are not better able to assess what are generally the crucial variables: moral outrage and strength of evidence of illegality.

The Congress could, by amending the criminal statutes or by oversight hearings, affect this process, but it is hard to imagine the Congress or any legislature forbidding law-enforcement authorities from bringing a particular type of prosecution in a situation where large numbers of the public would consider the underlying conduct highly immoral or corrupt. It would be easier to reduce social security. Even if the Congress explained that the purpose was not to protect immoral or corrupt conduct but rather to have it prosecuted by state or local officials, the fact would remain that in many cases the federal authorities would be walking away from conduct that was seriously wrongful without any assurance that it would ever be investigated and prosecuted, and this would hardly be a popular directive. Maybe that's why the Congress has never tried seriously to restrict the activities of federal prosecutors pursuing state or local corruption.

BUT WHAT then of the considerations of federalism that Professor Maass raises? He does not document practical difficulties in the administration of state and local government that are caused by federal prosecution of local officials for corruption. I'm sure there are sometimes such difficulties—being investigated is a painful, emotionally draining experience inconsistent with carrying on one's daily activities as usual—but, carried on responsibly, federal corruption investigations are not a serious threat to local government. Nor does Professor Maass dispute the extreme seriousness of the problems presented to any city, state, or nation by uncontrolled political corruption. The world is too full of examples of the near-collapse of patriotism and governmental legitimacy as a result of widespread corruption. In sum, there is a *very* serious problem if corruption grows apace; there is in practice no very serious problem caused by federal involvement in prosecuting local corruption; and there is a significant record of federal success in unearthing financially self-serving activities by government officials at the state and local level.

The heart of Professor Maass's case is that local authorities are both able and willing to fill the gap that would be left by the withdrawal of federal interest in state and local corruption. He may be right, but we can't tell from actions that are taken by local authorities who, under the present arrangements, know that the same tips and evidence will be made available to the federal government if they show no enthusiasm for the investigation. In a world of competition for corruption cases the federal government is bringing more than its share. In a world without competition it would surely be at least as likely that there would be a reduced state and local enthusiasm for prosecuting state and local officials as that new effort would be brought forward to fill the gap left by the departing federal authorities.

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IN THE FINAL ANALYSIS, if we don't know with any measure of confidence whether the withdrawal of federal interest would encourage a sharp increase in state and local corruption, then wise policy must be made in light of an estimate of the risks to our polity of far wider corruption and the risks to the independence and vigor of the states and localities of federal investigation and prosecution of state and local officials for corruption. For one who thinks that the former risks are far more serious than the latter, the idea of reducing federal attention to local corruption is hardly appealing.

There may be serious problems in the powerful public rewards that can flow to a federal prosecutor from a major public corruption case. The way to handle that problem might be for the attorney general to be pressed to forbid public announcements by the U.S. attorney concerning such investigations and ensuing indictments or convictions. And bringing to public attention the cost to individuals of investigations that have never resulted in indictment or charges that haven't resulted in conviction is surely another healthy response to what may be excessive prosecutorial indifference to the burdens that investigation and prosecution impose. Yet these are more general problems, not limited to public corruption cases. If it were asked to vote on a proposal to withdraw federal law enforcement from the fields of local and state corruption except in the special circumstances Professor Maass lists, Congress would oppose the withdrawal not only because of a well-founded fear of constituent reaction but also because the benefits of the program far exceed its cost.

Philip B. Heymann is Professor of Law and Director of the Center for Criminal Justice at Harvard Law School. He was Assistant Attorney General in charge of the Criminal Division of the U.S. Department of Justice from 1978-1981.

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Grading the Forecasters

I

JAMES C. MILLER III

IF YOU conduct a race in which one contestant is positioned at the starting line and the rest are half way down the track, it is not surprising who finishes last. That is what Charles Wolf, Jr. did in his article, "Scoring the Economic Forecasters" (*The Public Interest*, Summer 1987). For two of the four years, 1984 and 1986, Dr. Wolf used OMB (really Administration) forecasts made in January of the *prior* year; for everyone else, he used forecasts made in January of the year forecasted, fully twelve months *after* we made ours. When we correct for this, OMB's rank out of the fifteen forecasts jumps from fourteenth place in 1984 to second place, and from fifteenth in 1986 to ninth. In the composite score for 1983-86, OMB rises from fifteenth place to eleventh.

Moreover, Dr. Wolf's unconventional measure of accuracy results in a misleading indication of error size. His scores are heavily influenced by the magnitude of the actual outcome rather than the forecast mistake. If you adopt the usual approach to measuring forecast errors—the difference in percentage points between forecasts and actual outcomes—you get a different picture. Using this standard, the General Accounting Office reported in January, 1986, that "neither OMB nor CBO has been substantially less accurate than the private sector forecasters in forecasting the upcoming year." That conclusion is reinforced by a study published this year in the *Journal of Policy Analysis and Management*, which states that OMB's forecasts for the coming year "are as accurate as private forecasts and the forecasts of the Congressional Budget Office." Ironically, Dr. Wolf is a founding editor of that journal.

Finally, OMB's "forecasts" are not forecasts in the usual sense. As an integral part of a policy document known as the president's budget, OMB's forecasts assume that the president's budget, including all of the policy changes incorporated therein, will be adopted in its entirety. Even though the effects are much more pronounced in the outyears, this assumption does affect OMB's "forecast" for the calendar year at issue. Also, since the budget eventually adopted is the product of negotiation, we would be foolish to publish a forecast

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based on our best guess of the eventual outcome. In this sense, if OMB's "forecast" doesn't quite measure up as an apple, maybe it's because it is an orange.

James C. Miller III is Director of the Office of Management and Budget. His comments first appeared in the July 14, 1987 issue of the Wall Street Journal.

II

DANIEL T. VAN DYKE

CHARLES Wolf, Jr. suggests that "macroeconomic forecasting is a hazardous, difficult, and imperfect art." Judging from his article, forecasting is certainly less difficult and hazardous than ranking the forecasters.

At Bank of America, we are uncertain whether to be amused or enraged at this article, which contains flagrant mistakes. Those errors can be grouped into four categories: failure to give weight to the direction of the forecast indicators; a poor choice of error measurement; an unconscionable treatment of missing data; and refusal to treat organizations alike when selecting forecasts for evaluation.

Direction of the forecast:

"*Whether the forecast is above or below the outcome doesn't affect the score.*" Business managers and government policymakers need to know, among other things, whether growth, inflation, and interest rates will be above or below last year's levels. If a forecaster misses the size of a change, but gets the direction right, he is still providing positive information. Under Wolf's scoring system, two forecasters could have the same score even though one missed the indicator's direction and the other got it right.

Suppose, for example, that the CPI increases 3 percent in a given year. For the following year, one forecaster predicts that the CPI will increase 3.5 percent, while another predicts that it will increase only 1.5 percent. If, in fact, the CPI increase then drops to 2.5 percent, both forecasters will have an absolute error of 40 percent; but one forecaster correctly predicted the direction in which the indicator moved—namely, down—while the other missed the direction. Despite equal scores, one was certainly more prescient than the other.

Measure of error:

"*The* Economic Forecast Scoring System *(EFSS) expresses the absolute difference between forecast and outcome as a percentage of the actual outcome.*" The measure of error should have to do

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with the skill of the forecaster, not with the size of the outcome. In 1980, for example, real GNP declined 0.2 percent. If a forecaster predicted a 0.6 percent decline, missing by 0.4 percent, Wolf would score this a 200 percent miss.

In 1984, real GNP grew by 6.8 percent. A forecaster predicting real GNP growth of 6.4 percent would make an error of similar size —0.4 percentage points. In this case, however, Wolf's method results in a 5.9 percent error. The difference between a 200 percent and a 5.9 percent error suggests a difference in forecasting ability that does not indicate the forecasters' relative skills. In fact, Wolf's measure cannot even be computed if the outcome is zero.

Missing data:

"I assumed the missing observation was equal to the average of the remaining forecasts for that indicator in that year." This is an incredible admission, and one that makes Wolf's comparison virtually useless. Wolf essentially manufactures data for observations that were missing from his data set by replacing missing observations with the average of other forecasters' predictions. In our case, he uses such an average for our interest-rate forecasts; this average represents one-quarter of the variables he evaluates. Then, with a straight face, Wolf purports to evaluate various forecasters based on this bastardized data set.

Using Wolf's baseball analogy, his approach is analogous to figuring batting averages using the league average for some hitters for the first quarter of the season. This unprecedented approach penalizes the good hitters and produces a meaningless comparison among all of the hitters.

Using the correct forecast:

"T-bill forecasts by the Bank of America . . . would not . . . have been appropriate to use because their probabilistic structure made them noncomparable to the other forecasts in the sample." At Bank of America, we produce one forecast based on a set of assumptions about external circumstances we consider most likely to occur. Like most, if not all, of the organizations in Wolf's sample, we also produce other forecasts based on two or three alternative sets of external circumstances. (For example, DRI, one of the sample organizations, produced five forecasts in January 1983, one of Wolf's sample months.)

The forecast that Wolf uses for each of the other organizations is the one each has indicated as most likely to occur. However, for reasons known only to Wolf, he refuses to use our "most likely" forecast for the T-bill rate. Instead, he chooses to hide behind some virtually incomprehensible English buried in a footnote (quoted above). Wolf's unwillingness to treat organizations equally in his choice of forecasts is another reason that his comparison is misleading at best, and totally useless at worst.

Daniel T. Van Dyke is Vice-President of U.S. Economic Forecasting at Bank of America.

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A Reply

CHARLES WOLF, JR.

MR. VAN DYKE correctly observes that my Economic Forecast Scoring System (EFSS) does not take account of the accuracy with which individual forecasters predict the direction of change in a particular indicator from the prior year. Indeed, this is only one among several sorts of information that EFSS, as presently constituted, excludes. I chose to ignore direction of change, and to focus instead on the absolute size of the prediction error, for two reasons:

1. An error in predicting the magnitude of change is generally more important than an error in predicting the direction. Mr. Van Dyke argues that if two forecasters have the same absolute error but one of them predicts the direction of change correctly, their score should take this into account. Perhaps . . . but by how much? Suppose both forecasters are equally far from the mark, but in opposite directions. How much scoring advantage should be accorded the one who got the direction right? The answer depends on what decision analysts and operations researchers refer to as a "loss function": the loss incurred if one estimate is accepted rather than another. If the user of a forecast had accepted the downside error as though it were accurate, how much would that have cost (or embarrassed or inconvenienced) him? Conversely, if he had instead accepted the reverse error, what damage would have been incurred? The answer depends on the use made of the forecast. If, for example, the user planned to apply a CPI forecast to help estimate tax revenues, he would probably have preferred the downside error. If, on the other hand, he had been concerned with planning a firm's wage and salary policy, he would probably have been better off with the upside error, *regardless of whether the direction of change had been accurately predicted.*

2. Omitting direction of change from EFSS reflects the aim of keeping the system as simple as possible, consistent with its basic objective of providing a useful source of discipline in the forecasting field and a valuable source of information for users.

Mr. Van Dyke makes a fair point about the possible distorting effects in EFSS resulting from its expression of prediction error as a percentage of the actual outcome. Although there is a rationale for the normalizing procedure that I followed, I would plan in subse-

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quent iterations of EFSS to take Mr. Van Dyke's point into account; I would base the rankings for each indicator on the absolute difference between forecast and outcome (without normalizing by the actual outcome), and would then arrive at the composite score of each forecaster in each year simply by computing the sum of the separate rankings of that forecaster for each indicator.

Mr. Van Dyke's third criticism about my treatment of missing data is more shadow than substance. The data set used in EFSS consists of four indicators (CPI change, GNP growth, T-bill rate, and unemployment rate) tracked over four years for fifteen forecasters, representing a total of 240 entries. Of this total, eleven observations were missing from the original Blue Chip Survey tables that I used. To provide reasonable proxies for the missing observations, I computed the average of the forecasts by the other forecasters for the corresponding indicator in a particular year—a procedure that avoids imposing a penalty or conferring a relative advantage as a result of the missing observation. The Bank of America's T-bill forecasts were missing from the published Blue Chip data for 1983, 1984, and 1986. The procedure that I followed resulted in imputed estimates for those years of 7.4%, 8.6%, and 7.2%, respectively, compared with the Bank's "most likely" internal and "confidential" estimates (which were sent to me after the original calculations had been made) of 7.9%, 9.2%, and 7.1%, respectively. For these three years, use of the "most likely," rather than the imputed, estimates for the missing observations would have improved the Bank of America's EFSS score by less than .14, a difference that *would not have affected its ranking among the fifteen forecasters in the sample for the 1983-86 period as a whole*. Mr. Van Dyke's claim that the imputation procedure was "incredible" is thus belied by the results.

FINALLY, IT WAS and is my intention in EFSS to treat all forecasters in the same way. The T-bill forecasts, which the Bank of America has characterized as "most likely," carried a probability estimate of .65 in 1983 and 1984, and of .45 in 1986. The correct way to handle such probability estimates is to make an expected-value calculation—that is, to multiply each T-bill estimate by its associated probability, and to sum over the entire probability distribution. The absence of this calculation, and of published information on which to base it for the 35% to 55% of the probability distribution not included in the "most likely" case, constituted the "non-comparable . . . probabilistic structure" that I referred to in my article.

If, as Mr. Van Dyke argues, other forecasters also neglect to make expected-value calculations, that was not evident to me in the original Blue Chip data, or in the separate estimates published by OMB or CBO. If forecasters are somehow able to make probability estimates of "most likely" and other contingencies, they owe it to their users to produce expected-value estimates covering the entire probability distribution.

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Mr. Miller's criticisms are easier to deal with because of their validity. The recording error Mr. Miller refers to occurred inadvertently because the OMB forecasts for 1984 and 1986 were copied from official federal budget tables, dated January 1983 and January 1985 respectively, that also contained the OMB forecasts for 1983 and 1985. The effect on OMB's EFSS scores of using the later data is exactly as Mr. Miller reports them.

While it is perhaps fair to say that OMB's "forecasts" are somewhat different in character from the other forecasts, because they are linked to the president's official budget requests, it should be possible for OMB to make a nonpolitical forecast simply by basing an alternative set of estimates on a "current services" budget scenario. Such a forecast would be based on existing expenditure and revenue provisions and estimates, apart from any new proposals contained in the president's budget submission. Producing an alternative forecast of this kind would not weaken OMB's position in subsequent budget negotiations with Congress, but would facilitate a more responsible judgment about the relative accuracy of OMB forecasts compared with others.

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